

(26,443)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 411.

WILLIAM SCHALL, JR., CARL MULLER, EDMUND PAVEN-
STEDT, AND FREDERICK MULLER-SCHALL, PETI-
TIONERS,

vs.

FREDERIC CAMORS ET AL., TRUSTEES OF THE BANK-
RUPT ESTATES OF ALBERT LEMORE, BANKRUPT,
AND OF EDWARD E. CARRIERE, BANKRUPT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on Wednesday, November 21st, A. D. 1917, at New Orleans, Louisiana, Before the Honorable Richard W. Walker and the Honorable Robert L. Batts, Circuit Judges, and the Honorable William I. Grubb, District Judge.

WILLIAM SCHALL, JR., et als., Appellants,

versus

FREDERIC CAMORS et als., Trustees of Estates of Albert Le More and Edward E. Carriere, Bankrupts, Appellees.

Be it remembered, that heretofore, to-wit, on the 8th day of October, A. D. 1917, a transcript of the record of the above styled cause, pursuant to an appeal from the District Court of the United States for the Eastern District of Louisiana, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3164, as follows:

b *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 3164.

WILLIAM SCHALL, JR., et als., Appellants,

versus

FREDERIC CAMORS et als., Trustees of Estates of Albert Le More and Edward E. Carriere, Bankrupts, Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

[Original Record Filed October 8, 1917.]

U. S. Circuit Court of Appeals. Filed Nov. 24, 1917. Frank H. Mortimer, Clerk.

1 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana,
New Orleans Division.

No. 1880.

MULLER, SCHALL & COMPANY, Appellant,
versus

FREDERIC CAMORS, R. M. WALMSLEY, and NICHOLAS RIVIERE, Trus-
tees in Bankruptcy of A. Le More & Company et als., Bankrupts,
Appellees.

No. 1880. In Bankruptcy.

(In re A. LE MORE & Co. et als., Bankrupts.)

Appearances:

Howe, Fenner, Spencer & Cocke, and Rounds, Hatch, Dillingham
& Debevoise, Attorneys for Appellant;
Hall, Monroe & Lemann, and D. B. H. Chaffe, Attys. for Appellees.

Appeal from the District Court of the United States for the Eastern
District of Louisiana, New Orleans Division, to the United States
Circuit Court of Appeals for the Fifth Circuit, Returnable within
Thirty Days from the 13th Day of September, A. D. 1917, at the
City of New Orleans, State of Louisiana.

TRANSCRIPT OF APPEAL.

2 *Proof of Debt of Muller, Schall & Co., against Partnership of
A. Le More & Co. and Ed. E. Carriere & Co.*

Filed Before Referee May 8, 1915, @ 10 A. M.

Filed in Court August 14, 1916, @ 11:45 A. M.

In the District Court of the United States for the Eastern District of
Louisiana, New Orleans Division.

No. 1880. In Bankruptcy.

In the Matter of ALBERT LE MORE and ED. E. CARRIERE, Individu-
ally and as Copartners, Conducting Business under the Firm-name
of A. Le More & Co. and Ed. E. Carriere & Co., Bankrupts.

Proof of Debt against Partnership.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

At the Borough of Manhattan, City of New York, State of New
York, in the Southern District of New York, on the 4th day of May,

1915, came Carl Muller, of the City, County and State of New York, and made oath and says: That he is one of the firm of Muller, Schall & Company, consisting of himself and William Schall, Jr., of New London, Connecticut and Edmund Pavenstedt and Frederick Muller Schall, Jr. of the City, County and State of New York; that until January 2, 1915, said firm of Muller, Schall & Company, being the firm hereinafter referred to as "Muller, Schall & Company" consisted of himself, Carl Muller, and said William Schall, Jr. and said Edmund Pavenstedt and Frederick Muller of Bremen, Germany, and that said firm as so constituted has duly assigned to said firm as now constituted, all its claims and rights against the bankrupts above named, including the debt set forth in this proof; that the above named bankrupt partnership, doing business under the names of

3 A. Le More & Co. and Ed. E. Carriere & Co., against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of Seventy thousand and fifty dollars (\$70,050); that the consideration of said debt is as follows:

1. On or about November 5, 1913, Muller, Schall & Company, in good faith purchased from said partnership a draft for £3424.10s., equivalent in United States Currency to sixteen thousand, six hundred and sixty-five and 33/100 Dollars (\$16,665.33), drawn by said partnership on Coulon Berthoud & Co. of London, England, together with a bill of lading accompanying and securing said draft and purporting to represent a large shipment of staves by said partnership, upon the understanding that said bill of lading should be delivered to the drawees on acceptance, and thereupon Muller, Schall & Company paid therefor to said partnership Sixteen thousand, three hundred and sixty-nine and 12/100 Dollars (\$16,369.12). On or about November 11, 1913, said draft was accepted and said bill of lading was surrendered to Coulon Berthoud & Co., and at its maturity said draft was presented for payment and dishonored and was thereupon protested and notice of dishonor and protest given to said partnership as drawers; and no part thereof has been paid. A copy of said draft is annexed hereto.

On or about November 29, 1913, Muller, Schall & Company in good faith purchased from said partnership a draft for Frs. 98,706.83, equivalent in United States currency to Nineteen thousand and fifty and 42/100 Dollars (\$19,050.42) drawn by said partnership on B. Gairard Fils. at Marseilles, France, together with a bill of lading accompanying and securing said draft and purporting to represent a large shipment of staves by such partnership, upon the understanding that said bill of lading should be delivered to the drawees on acceptance and thereupon Muller, Schall & Company paid therefor to said partnership Eighteen thousand seven hundred and thirty-four and 40/100 Dollars (\$18,734.40).

4 On or about December 10, 1913, said draft was accepted and said bill of lading was surrendered to B. Gairard Fils. and at its maturity said draft was presented for payment and dishonored and was thereupon protested and notice of dishonor and

protest given to said partnership as drawers; and no part thereof has been paid. A copy of said draft is annexed hereto.

On or about December 23, 1913, Muller, Schall & Company in good faith purchased from said partnership a draft for Frs. 100,-855.38, equivalent in United States currency to Nineteen thousand, four hundred and sixty-five and 09/100 Dollars (\$19,465.09), drawn by said partnership on B. Gairard Fils. at Marseilles, France, together with a bill of lading accompanying and securing said draft and purporting to represent a large shipment of staves by said partnership, upon the understanding that said bill of lading should be delivered to the drawees on acceptance, and thereupon Muller, Schall & Company paid therefor, to said partnership Nineteen thousand and ninety-six and 89/100 Dollars (\$19,096.89). On or about January 3, 1914, said draft was accepted and said bill of lading was surrendered to B. Gairard Fils. and at its maturity said draft was presented for payment and dishonored and was thereupon protested and notice of dishonor and protest given to said partnership as drawees; and no part thereof has been paid. A copy of said draft is annexed hereto.

At and before the time of the purchase of said respective drafts by Muller, Schall & Company, said partnership, the drawer of said drafts, and the individual bankrupts above named, with full knowledge of the true facts, represented to Muller, Schall & Company for the purpose of inducing them to purchase said drafts, that said respective drafts were secured by a large shipment of staves, to wit, the staves described in the respective bills of lading accompanying said drafts, and that said drafts were drawn upon the purchasers of said staves in the ordinary course of business and as a means of payment therefor, and that the respective drawees of said drafts upon their acceptance thereof would receive valuable property to
5 provide for the payment thereof at maturity, to wit, said staves represented by said bills of lading, which, as deponent is informed and believes, would under the laws of England and France, under certain conditions, be available to Muller, Schall & Company as security or provision for the payments of said drafts even after delivery of said bills of lading to drawees, and that said partnership was a solvent concern with large assets in excess of its liabilities and engaged in a legitimate and profitable business; and Muller, Schall & Company purchased said drafts with said bills of lading and paid therefor in full reliance on and belief in said representations and the facts so represented and in ignorance of the true facts, all to their damage in the sum of Fifty-four thousand two hundred and 41/100 Dollars (\$54,200.41) with interest on Sixteen thousand three hundred and sixty-nine and 12/100 Dollars (\$16,369.12) from November 5, 1913 and on Eighteen thousand seven hundred and thirty-four and 40/100 Dollars (\$16,734.40) from November 29, 1913, and on Nineteen thousand and ninety-six and 89/100 Dollars (\$19,096.89) from December 23, 1913; and if the facts so represented had been true, Muller, Schall & Company would have been fully secured. In truth and in fact, as deponent is informed and believes, no staves were shipped to the drawees of said drafts

and said bills of lading did not represent any shipments of staves whatever and said bills of lading were false and fraudulent and said drafts were not drawn upon purchasers of staves as a means of providing payment therefor and the acceptors of said drafts did not receive any property from said partnership or from any person to provide for their payment, and said partnership was at all times in question insolvent, with assets much less than its liabilities and was doing an unprofitable business largely based on misrepresentation, all of which said partnership and its co-partners well knew; and said transactions were wholly false and fraudulent, to the knowledge of said partnership and its co-partners, the bankrupt above named, and were intended to defraud Muller, Schall & Company.

6 2. On or about January 28, 1914, Muller, Schall & Company in good faith purchased from said partnership two checks for Francs 25,000 each, together equivalent in United States currency to Nine thousand six hundred and fifty dollars (\$9,650) drawn by said partnership on Association Industrielle Francais at Paris, France, and thereupon Muller, Schall & Company paid for said two checks to said partnership Nine thousand six hundred and twenty-six and 96/100 Dollars (\$9,626.96). On or about February 6, 1914, said checks were presented for payment and dishonored and were thereupon protested and notice of dishonor and protest given to said partnership as drawees; and no part thereof has been paid. Copies of said checks are annexed hereto.

On or about January 28, 1914, Muller, Schall & Company in good faith purchased from said partnership a check for Francs 25,000, equivalent in United States currency to Four thousand eight hundred and twenty-five Dollars (\$4,825), drawn by said partnership on Banque de Reports de Fonds Public et de Depots at Antwerp, Belgium, and thereupon Muller, Schall & Company paid therefor to said partnership Four thousand seven hundred and seventy-eight and 97/100 Dollars (\$4,778.97). On or about February 7, 1914, said check was presented for payment and dishonored and was thereupon protested and notice of dishonor and protest given to said partnership as drawees; and no part thereof has been paid. A copy of said check is annexed hereto.

At and before the time of the purchase of said checks by Muller, Schall & Company, said partnership and its copartners, with full knowledge of the true facts, represented to Muller, Schall & Company for the purpose of inducing them to purchase said checks, that their said partnership, the drawer of said checks, was a solvent concern with large assets in excess of its liabilities and engaged in a legitimate and profitable business, and presented to Muller, Schall &

7 Company a written statement showing very large assets in excess of liabilities; and Muller, Schall & Company purchased said checks in full reliance on and belief in said representations and the facts so represented and in ignorance of the true facts, all to their damage in the sum of Fourteen thousand four hundred five and 93/100 Dollars (\$14,405.93) with interest from January 28, 1914. In truth and in fact, as deponent is informed and believes, said partnership was at all the times in question insolvent, with assets much less than its

liabilities and was doing an unprofitable business largely based on misrepresentations, and said written statement was false, all of which said partnership and its copartners well knew; and said transactions werewholly false and fraudulent to the knowledge of said partnership and its copartners, the bankrupts above named, and were intended to defraud Muller, Schall & Company.

That no part of said debt has been paid and there are no setoffs or counter claims to the same and no note has been received for the said debt nor any judgment rendered thereon. That save as aforesaid, deponent has not nor has his said firm nor has any person by their order or to the knowledge or belief of deponent for their use had or received any manner of security for said debt whatever and no security is now held.

That Muller, Schall & Company do not waive any right of action or other right whatever of any kind, nature or description that they now have against Abert Le More or against Edward E. Carriere or against any other person, and they do not waive any right to sue or proceed against said Abert Le More or Edward E. Carriere alone or with others upon contract or for fraud or deceit or for any matter arising out of or connected with the transactions set forth in this proof of debt or to recover and sue upon the bills of lading above mentioned.

(Signed)

C. MULLER.

Subscribed and sworn to before me this 4th day of May, 1915.

(Signed)

EUGENE CONGLETON,

[SEAL.]

Notary Public, New York County, N. Y.

8

Exchange for £3424.10/.

New Orleans, La., October 30th, 1913.

(90) Ninety days after sight of this First of Exchange (Second unpaid) pay to the Order of Edw. Duplantier, Thirty-four hundred and twenty-four Pounds 10/-Sterling Value received and charge the same to account of ——— against a shipment of Staves as advised.

A. LE MORE & CO.

To Messrs. Coulon Berthoud & Co., 7-11 Moorgate Street, London England.

No. 4628.

Indorsed on face: No. 5341. Accepted 11th November, 1913, Payable at The Union of London & Smiths Bank, Ltd., Lombard Street Office. p. p. Coulon Berthoud & Co. Thos. J. Apthrop, Prot. n-p-16/-J. A. D.-12 Feb., 1914 p. 90, p. 92.

Indorsed on back: Pay Messrs. Muller, Schall & Co., or order, P. P. Ewd. Duplantier, M. E. Kloorfain.

A true copy:

(Signed)

WM. A. BELL, *Referee.*

5/8/15.

9	Exchange for Frs. 98706	83
		<u>100</u>

New Orleans, La., November 25th, 1913.

Ninety (90) days after sight on this First of Exchange (Second unpaid) pay to the order of Edw. Duplantier, Ninety eight thousand seven hundred six 83/100 francs. Value received and charge the same to account of — — Against a shipment of as advised.

A. LE MORE & CO.

PPRO (Signature Illegible.)

Au besoin a Banque Nationale de Credit.

To Mons. B. Gairard Fils, Marseilles, France.

No. 8848.

Indorsed on face: Marseilles de dix Decembre, 1913. Accepte payable le dix Mars 1914 on P. P. B. Gairard Fils (Signature Illegible.) Revenue stamps cancelled. Note of registration in Marseilles.

Indorsed on back: Pay Messrs. Muller, Schall & Co. or order P. P. Edw. Duplantier, M. E. Kloorfain.

A true copy:
(Signed)

WM. A. BELL, *Referee.*

5/8/15.

10	Exchange for frs. 100855.	38
		<u>100</u>

New Orleans, La., December 19th, 1913.

Ninety (90) days after sight of this First of Exchange (Second unpaid) pay to the order of Edw. Duplantier, One hundred thousand eight hundred fifty five 38/100 Francs, Value received and charge the same to account of ———— Against a shipment of as advised.

A. LE MORE & CO.

No. 9069.

To Mons. B. Gairard Fils, Marseilles, France.

Au besoin a Banque Nationale de Credit.

Indorsed on face: Marseilles le trois Janvier 1914. Accepte Payable le trois Avril 1914 on P. P. B. Gairard Fils. (Signature Illegible.) Revenue stamps cancelled. Noted as registered in Marseilles.

Indorsed on back: Pay Messrs. Muller, Schall & Co. or order P. P. Edw. Duplantier M. E. Kloorfain.

A true copy:
(Signed)

WM. A. BELL, *Referee.*

5/8/15.

11 Frs. 25000. 00
 100

New Orleans, La., January twenty-fourth, 1914.

Pay to the order of Edw. Duplantier Twenty-five thousand Francs.
A. LE MORE & CO.

No. 2671.

To Association Industrielle Francaise, 32 Rue du Faub. Poissonniere, Paris, France.

Indorsed on face: Original-duplicate unpaid. Noted as registered in Paris.

Indorsed on back: Pay Messrs. Muller, Schall & Co. or order P. P. Edw. Duplantier, M. E. Kloorfain.

Revenue stamps cancelled.

A true copy:
(Signed)

WM. A. BELL, *Referee.*

5/8/15.

12 Frs. 25000. 00
 100

New Orleans, La., January twenty-fourth, 1914.

Pay to the order of Edw. Duplantier Twenty five thousand Francs.
A. LE MORE & CO.

No. 2676.

To Association Industrielle Francaise, 32 Rue du Faub. Poissonniere, Paris, France.

Indorsed on face: Original-duplicate unpaid. Noted as registered in Paris.

Indorsed on back: Pay Messrs. Muller, Schall & Co. or order P. P. Edw. Duplantier, M. E. Kloorfain.

A true copy:
(Signed)

WM. A. BELL, *Referee.*

5/8/15.

13	Frs. 25000.	00
		<u>100</u>

New Orleans, La., January twenty fourth, 1914.

Pay to the order of Edw. Duplantier Twenty five thousand Francs.
A. LE MORE & CO.

No. 2675.

To Banque de Reports de Fonds Public et de Depots. Antwerp, Belgium.

Indorsed on face: Original-duplicate unpaid.

A true copy:

5/8/15.

(Signed)

WM. A. BELL, *Referee.*

Indorsed on back: Pay Messrs. Muller, Schall & Co. or order
P. P. Edw. Duplantier, M. E. Kloorfain.

Revenue stamp cancelled.

14 *Proof of Debt of Muller, Schall & Co. against Albert Le More Individually.*

Filed Before Referee May 8, 1915, @ 10 A. M. Filed in Court
August 14, 1916, at 11:45 A. M.

In the District Court of the United States for the Eastern District of
Louisiana, New Orleans Division.

No. 1880. In Bankruptcy.

In the Matter of ALBERT LE MORE and EDWARD E. CARRIERE, Individually and as Co-partners Conducting Business under the Firm Name of A. Le More & Co. and Ed. E. Carriere & Co., Bankrupts.

Proof of Debt Against Albert Le More.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

At the Borough of Manhattan, City of New York, State of New York, in the Southern District of New York, on the 4th day of May, 1915, came Carl Muller, of the City, County and State of New York, and made oath and says: That he is one of the firm of Muller, Schall & Company, consisting of himself and William Schall, Jr., of New London, Connecticut, and Edmund Pavenstedt and Frederick Muller

Schall, Jr., of the City, County and State of New York; that until January 2, 1915, said firm of Muller, Schall & Company, being the firm hereinafter referred to as "Muller, Schall & Company" consisted of himself, Carl Muller, and said William Schall, Jr., and said Edmund Pavenstedt and Frederick Muller of Bremen, Germany, and that said firm as so constituted has duly assigned to said firm as now constituted, all its claims and rights against the bankrupts above named, including the debt set forth in this proof. That the above named bankrupt, Albert Le More, against whom a petition for adjudication of bankruptcy has been filed, was at and before

15 the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of Seventy-thousand and fifty dollars (\$70,050); that the consideration of said debt is as follows:

1. On or about November 5, 1913, Muller, Schall Company, in good faith purchased from the above named Albert Le More and Edward E. Carriere a draft for L3424.10s., equivalent in United States currency to Sixteen thousand, six hundred and sixty-five and 33/100 Dollars (\$16,665.33), drawn by said copartners on Coulon Berthoud & Co., at London, England, together with a bill of lading accompanying and securing said draft and purporting to represent a large shipment of staves by said copartners, upon the understanding that said bill of lading should be delivered to the drawees on acceptance, and thereupon Muller, Schall & Company paid therefor to said copartners Sixteen Thousand, three hundred and sixty-nine and 12/100 Dollars (\$16,369.12). On or about November 11, 1913, said draft was accepted and said bill of lading was surrendered to Coulon Berthoud & Co., and at its maturity said draft was presented for payment and was dishonored and no part thereof has been paid. The following is a copy of said draft and the same was at the time of its purchase duly indorsed to Muller, Schall & Company:

"Exchange for L3424.10/

New Orleans, La., October 30th, 1913.

(90) Ninety days after sight of this First of Exchange (Second unpaid) pay to the Order of Edw. Duplantier, Thirty-four hundred and twenty-four Pounds 10/-Sterling Value received and charge the same amount to account of — —, against a shipment of staves as advised.

To Messrs. Coulon Berthoud & Co., 7-11 Moorgate Street, London, England.

A. LE MORE & CO."

No. 4628.

16 On or about November 29, 1913, Muller, Schall & Company in good faith purchased from said copartners a draft for Francs 98,706.83, equivalent in United States currency to Nineteen thousand and fifty and 42/100 Dollars (\$19,050.42) drawn by said copartners on B. Gairard Fils, at Marseilles, France, together

with a bill of lading accompanying and securing said draft and purporting to represent a large shipment of staves by such copartners, upon the understanding that said bill of lading should be delivered to the drawees on acceptance and thereupon Muller, Schall & Company paid therefor to said copartners Eighteen Thousand seven hundred and thirty-four and 40/100 Dollars (\$18,734.40). On or about December 10, 1912, said draft was accepted and said bill of lading was surrendered to B. Gairard Fils, and at its maturity said draft was presented for payment and was dishonored no part thereof has been paid. The following is a copy of said draft and the same was duly indorsed to Muller, Schall & Company:

"Exchange for Frs. 98706 83/100.

New Orleans, La., November 25th, 1913.

Ninety (90) days after sight of this First of Exchange (Second unpaid) pay to the order of Edw. Duplantier, Ninety-eight thousand seven hundred six 83/100 francs Value Received and charge the same to account of — —, against a shipment of as advised.

To Mons. Gairard Fils, Marseilles, France.

A. LE MORE & CO.

No. 8848.

PPRO (Signature illegible.)"

On or about December 23, 1913, Muller, Schall & Company in good faith purchased from said copartners a draft for Francs 100,-855.38, equivalent in United States currency to Nineteen thousand, four hundred and sixty-five and 09/100 Dollars (\$19,465.09), drawn by said copartners on B. Gairard Fils, at Marseilles, France, together with a bill of lading accompanying and securing said draft and purporting to represent a large shipment of staves by said copartners, upon the understanding that said bill of lading should be delivered to the drawees on acceptance, and thereupon Muller, Schall & Company paid therefor to said copartners Nineteen thousand and ninety six and 89/100 Dollars (\$19,096.89). On or about January 3, 1914, said draft was accepted and said bill of lading was surrendered to B. Gairard Fils, and at its maturity said draft was presented for payment and was dishonored and no part thereof has been paid. The following is a copy of said draft and the same was duly indorsed to Muller, Schall & Company:

"Exchange for Frs. 100855 38/100.

New Orleans, La., December 19th, 1913.

Ninety (90) days after sight of this First of Exchange (Second unpaid) pay to the order of Edw. Duplantier, One hundred thousand eight hundred and fifty-five 38/100 Francs. Value received and charge the same to account of — —, against a shipment of as advised.

To Mons. B. Gairard Fils, Marseilles, France.

A. LE MORE & CO."

No. 9069.

At and before the time of the purchase of said respective drafts by Muller, Schall & Company, said bankrupt, Albert Le More with full knowledge of the true facts, represented to Muller, Schall & Company for the purpose of inducing them to purchase said drafts, that said respective drafts were secured by a large shipment of staves, to-wit, the staves described in the respective bills of lading accompanying said drafts, and that said drafts were drawn upon the purchasers of said staves in the ordinary course of business and as a means of payment therefor, and that the respective drawees of said drafts upon their acceptance would receive valuable property to provide for the payment thereof at maturity, to-wit, said staves represented by said bills of lading, (which as deponent is informed and believes, would under the laws of England and France, under certain conditions, be available to Muller, Schall & Company as security or provision for the payment of said drafts even after delivery of said bills of lading to the drawees) and that his

partnership was a solvent concern with large assets in excess of its liabilities and engaged in a legitimate and profitable business; and Muller, Schall & Company purchased said drafts with said bills of lading and paid therefor in full reliance on and belief in said representations and the facts so represented and in ignorance of the true facts, all to their damage in the sum of Fifty-four thousand two hundred and 41/100 Dollars (\$54,200.41) with interest on Sixteen thousand three hundred and sixty-nine and 12/100 Dollars (\$16,369.12) from November 5, 1913 and on Eighteen thousand seven hundred and thirty-four and 40/100 Dollars (\$18,734.40) from November 29, 1913 and on Nineteen thousand and ninety-six and 89/100 Dollars (\$19,096.89) from December 23, 1913, and if the facts so represented had been true, Muller, Schall & Company would have been fully secured. In truth and in fact, as deponent is informed and believes, no staves were shipped to the drawees of said drafts and said bills of lading did not represent any shipments of staves whatever and said bills of lading were false and fraudulent and said drafts were not drawn upon purchasers of staves as a means of providing payment therefor and the acceptors of said drafts did not receive any property from said partnership or from any person to provide for their payment, and said partnership was at all the times in question insolvent, with assets much less than *than* its liabilities and was doing an unprofitable business largely based on misrepresentation, all of which said Albert Le More and Edward E. Carriere well knew, and said transactions were wholly false and fraudulent, to their knowledge, and were intended to defraud Muller, Schall & Company.

2. On or about January 28, 1914, Muller, Schall & Company in good faith purchased from said copartners two checks for Francs 25,000 each, together equivalent in United States currency to Nine thousand six hundred and fifty Dollars (\$9,650) drawn by said copartners on Association Industrielle Francais at Paris, France, and thereupon Muller, Schall & Company paid for said two checks to said copartners Nine thousand six hundred and twenty-six and 96/100 Dollars (\$9,626.96). On or about February

6, 1914, said checks were presented for payment and were dishonored and no part thereof has been paid. The following is a copy of said checks and the same were duly indorsed to Muller, Schall & Company:

"Frs. 25000.00/100.

New Orleans, La., January twenty-fourth, 1914.

Pay to the order of Edw. Duplantier, Twenty-five thousand Francs.
To Association Industrielle Francais, 32 Rue du Faub. Poissoniere, Paris, France.

A. LE MORE & CO."

No. 2676.

"Frs. 25000.00/100.

New Orleans, La., January twenty-fourth, 1914.

Pay to the order of Edw. Duplantier, Twenty-five thousand Francs.
To Association Industrielle Francaise, 32 Rue du Faub. Poissoniere, Paris, France.

A. LE MORE & CO."

No. 2671.

On or about January 28, 1914, Muller, Schall & Company in good faith purchased from said copartners a check for Francs 25,000, equivalent in United States currency to Four thousand eight hundred and twenty-five dollars (\$4,825.) drawn by said copartners on Banque de Reports de Fonds Public et Depots at Antwerp, Belgium, and thereupon Muller, Schall & Company paid therefor to said copartners Four thousand seven hundred and seventy-eight and 97/100 Dollars (\$4,778.97). On or about February 7, 1914, said check was presented for payment and was dishonored and no part thereof has been paid. The following is a copy of said check and the same was duly indorsed to Muller, Schall & Company:

20 "Frs. 25000.00/100.

New Orleans, La., January twenty-fourth, 1914.

Pay to the order of Edw. Duplantier, Twenty-five thousand Francs.

To Banque de Reports de Fonds Public et de Depots, Antwerp, Belgium.

A. LE MORE & CO."

No. 2675.

At and before the time of the purchase of said checks by Muller, Schall & Company, said bankrupt, Albert Le More, with full knowledge of the true facts, represented to Muller, Schall & Company for the purpose of inducing them to purchase said checks, that his said partnership, the drawer of said checks, was a solvent concern with

large assets in excess of its liabilities and engaged in a legitimate and profitable business, and presented to Muller, Schall & Company a written statement showing very large assets in excess of liabilities; and Muller, Schall & Company purchased said checks in full reliance on and belief in said representations and the facts so represented and in ignorance of the true facts, all to their damage in the sum of Fourteen thousand four hundred five and 93/100 Dollars (\$14,405.93) with interest from January 28, 1914. In truth and in fact, as deponent is informed and believes, said partnership was at all the times in question insolvent, with assets much less than its liabilities and was doing an unprofitable business largely based on misrepresentation, and said written statement was false, all of which said Albert Le More and Edward E. Carriere well knew; and said transactions were wholly false and fraudulent to their knowledge and were intended to defraud Muller, Schall & Company.

That no part of said debt has been paid and there are no set-offs or counterclaims to the same and no note has been received for the said debt nor any judgment rendered thereon. That save as aforesaid, deponent has not nor has his said firm nor has any person by their order or to the knowledge or belief of deponent for their use had or received any manner of security for said debt whatever and no security is now held.

21 That Muller, Schall & Company do not waive any right of action or other right whatever of any kind, nature or description that they now have against the bankrupt partnership or against Edward E. Carriere or against any other person, and they do not waive any right to sue or proceed against said partnership or Albert Le More or Edward E. Carriere alone or with others upon contract or for fraud or deceit or for any matter arising out of or connected with the transactions set forth in this proof of debt or to recover and sue upon the bills of lading above mentioned.

(Signed)

C. MULLER.

Subscribed and sworn to before me this 4th day of May, 1915.

(Sig.)

EUGENE CONGLETON,

[SEAL.]

Notary Public, New York County, New York.

22 *Proof of Debt of Muller, Schall & Co. Against Ed. E. Carriere Individually.*

Filed Before Referee May 8, 1915, @ 10 A. M., filed in Court August 14, 1916, at 11:45 A. M.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

No. 1880. In Bankruptcy.

In the Matter of ALBERT LE MORE and EDWARD E. CARRIERE, Individually and as Co-partners, Conducting Business under the Firm Name of A. Le More & Co. and Ed. E. Carriere & Co., Bankrupts.

Proof of Debt Against Edward E. Carriere.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

At the Borough of Manhattan, City of New York, State of New York, in the Southern District of New York, on the 4th day of May, 1915, came Carl Muller, of the City, County and State of New York, and made oath and says: That he is one of the firm of Muller, Schall & Company, consisting of himself and William Schall, Jr., of New London, Connecticut and Edmund Pavenstedt, Frederick Muller Schall, Jr., of the City, County and State of New York; that until January 2, 1915, said firm of Muller, Schall & Company, being the firm hereinafter referred to as "Muller, Schall & Company" consisted of himself, Carl Muller, and said William Schall, Jr., and said Edmund Pavenstedt and Frederick Muller of Bremen, Germany, and that said firm as so constituted has duly assigned to said firm as now constituted, all its claims and rights against the bankrupts above named, including the debt set forth in this proof; That the above named bankrupt, Edward E. Carriere, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of seventy thousand and fifty dollars (\$70,050); that the consideration of said debt is as follows:

23 1. On or about November 5, 1913, Muller, Schall & Company, in good faith purchased from the above named Albert Lemore and Edward E. Carriere a draft for L3424.10s, equivalent in United States currency to Sixteen thousand, six hundred and sixty-five and 33/100 Dollars (\$16,665.33) drawn by said co-partners on Coulon Berthoud & Co., at London, England, together with a bill of lading accompanying and securing said draft and purport-

ing to represent a large shipment of staves by said copartners, upon the understanding that said bill of lading should be delivered to the drawees on acceptance, and thereupon Muller, Schall & Company paid therefor to said copartners sixteen thousand three hundred and sixty-nine and 12/100 Dollars (\$16,369.12). On or about November 11, 1913, said draft was accepted and said bill of lading was surrendered to Coulon Berthoud & Co. and at its maturity said draft was presented for payment and was dishonored and no part thereof has been paid. The following is a copy of said draft and the same was at the time of its purchase duly indorsed to Muller, Schall & Company;

New Orleans, La., October 30th, 1913.

"Exchange for L3424.10/—

(90) Ninety days after sight of this First of Exchange (Second unpaid) pay to the order of Edw. Duplantier, Thirty-four hundred and twenty-four Pounds 10/—Sterling Value received and charge the same to account of ———, Against a shipment of staves as advised.

To Messrs. Coulon Berthoud & Co., 7-11 Moorgate Street, London, England.

No. 4628.

A. LEMORE & CO."

On or about November 29, 1913, Muller, Schall & Company in good faith purchased from said copartners a draft for Frans
24 98,706.83, equivalent in United States currency to Nineteen thousand and fifty and 42/100 Dollars (\$19,050.42) drawn by said copartners on B. Gairard Fils, at Marseilles, France, together with a bill of lading securing said draft and purporting to represent a large shipment of staves by such copartners, upon the understanding that said bill of lading should be delivered to the drawees on acceptance and thereupon Muller, Schall & Company paid therefor to said copartners Eighteen Thousand seven hundred and thirty-four and 40/100 Dollars (\$18,734.40). On or about December 10, 1913, said draft was accepted and said bill of lading was surrendered to B. Gairard Fils and at its maturity said draft was presented for payment and was dishonored and no part thereof has been paid. The following is a copy of said draft and the same was duly indorsed to Muller, Schall & Company;

"Exchange for Frs. 98706 83/100.

New Orleans, La., November 25th, 1913.

Ninety (90) days after sight of this First of Exchange (Second unpaid) pay to the order of Edw. Duplantier, Ninety-eight thousand

seven hundred and six 83/100 francs Value received and charge the same to account of ———, Against a shipment of as advised. To Mons. B. Gairard Fils, Marseilles, France.

No. 8848.

A. LEMORE & CO.

PPRO (Signature illegible)."

On or about December 23, 1913, Muller, Schall & Company in good faith purchased from said copartners a draft for Francs 100,-855.38, equivalent in United States currency to Nineteen thousand, four hundred and sixty-five and 09/100 Dollars (\$19,465.09), drawn by said copartners on B. Gairard Fils, at Marseilles, France, together with a bill of lading accompanying and securing said draft and purporting to represent a large shipment of staves by said copartners, upon the understanding that said bill of lading should be delivered to the drawees on acceptance, and thereupon Muller, Schall & Company paid therefor to said copartners Nineteen thousand and ninety-six and 89/100 Dollars (\$19,096.89). On or about January 3, 1914, said draft was accepted and said bill of lading was surrendered to Gairard Fils, and at its maturity said draft was presented for payment and was dishonored and no part thereof has been paid. The following is a copy of said draft and the same was duly indorsed to Muller, Schall & Company;

"Exchange for Frs. 100855.38/100.

New Orleans, La., December 19th, 1913.

Ninety (90) days after sight of this First of Exchange (Second unpaid) pay to the order of Edw. Duplantier, One hundred thousand eight hundred and fifty-five 38/100 Francs. Value received and charge the same to account of ——— Against a shipment of as advised.

To Mons. B. Gairard Fils, Marseilles, France.

No. 9069.

A. LEMORE & CO."

At and before the time of the purchase of said respective drafts by Muller, Schall & Company, said bankrupt Edward E. Carriere, with full knowledge of the true facts, represented to Muller, Schall & Company for the purpose of inducing them to purchase said drafts, that said respective drafts were secured by a large shipment of staves, to-wit, the staves described in the respective bills of lading accompanying said drafts, and that said drafts were drawn upon the purchasers of said staves in the ordinary course of business and as a means of payment therefor, and that the respective drawees of said drafts upon their acceptance thereof, would receive valuable property to provide for the payment thereof at maturity, to-wit, said staves represented by said bills of lading (which, as deponent is informed and believes, would under the laws of England and France, under certain conditions, be available to Muller, Schall & Company as se-

26 curity or provision for the payment of said drafts even after delivery of said bills of lading to the drawees) and that his partnership was a solvent concern with large assets in excess of its liabilities and engaged in a legitimate and profitable business; and Muller, Schall & Company purchased said drafts with bills of lading and paid therefor in full reliance on and belief in said representations and the facts so represented and in ignorance of the true facts, all to their damage in the sum of Fifty-four thousand two hundred and 41/100 Dollars (\$54,200.41) with interest on Sixteen thousand three hundred and sixty-nine and 12/100 Dollars (\$16,369.12) from November 5, 1913, and on Eighteen thousand seven hundred and thirty-four and 40/100 Dollars (\$18,734.40) from November 29, 1913, and on Nineteen thousand and ninety-six and 89/100 Dollars (\$19,096.89) from December 23, 1913; and if the facts so represented had been true, Muller, Schall & Company would have been fully secured. In truth and in fact, as deponent is informed and believes, no staves were shipped to the drawees of said drafts and said bills of lading did not represent any shipments of staves whatever and said drafts were not drawn upon purchasers of staves as a means of providing payment therefor and the acceptors of said drafts did not receive any property from said partnership or from any person to provide for their payment, and said partnership was at all times in question insolvent, with assets much less than its liabilities and was doing an unprofitable business largely based on misrepresentation, all of which said Albert Le More and Edward E. Carriere well knew, and said transactions were wholly false and fraudulent to their knowledge, and were intended to defraud Muller, Schall & Company.

2. On or about January 28, 1914, Muller, Schall & Company, in good faith purchased from said copartners two checks for Francs 25,000 each, together equivalent in United States currency to Nine thousand six hundred and fifty Dollars (\$9,650) drawn by said copartners on Association Industrielle Francais at Paris, France, and thereupon Muller, Schall & Company paid for said two checks to said copartners Nine thousand six hundred and twenty-six and 96/100 Dollars (\$9,626.95). On or about February 6, 1914, said checks were presented for payment and were dishonored and no part thereof has been paid. The following is a copy of said checks and the same were duly indorsed to Muller, Schall & Company:

"Fr. 25000.00/100.

New Orleans, La., January twenty-fourth, 1914.

Pay to the order of Edw. Duplantier, Twenty-five thousand Francs.

To Association Industrielle Francais, 32 Rue du Faub. Poissoniere, Paris, France.

No. 2676.

A. LEMORE & CO."

"Frs. 25000.00/100.

New Orleans, La., January twenty-fourth, 1914.

Pay to the order of Edw. Duplantier, Twenty-five thousand Francs.

To Association Industrielle Francais, 32 Rue du Faub. Poissonniere, Paris, France.

No. 2671.

A. LEMORE & CO."

On or about January 28, 1914, Muller, Schall & Company in good faith purchased from said copartners a check for Francs 25000 equivalent in United States currency to Four thousand eight hundred and twenty-five dollars (\$4,825) drawn by said copartners on Banque de Reports de Fonds Public et de Depots at Antwerp, Belgium, and thereupon Muller, Schall & Company paid therefor to said copartners Four thousand seven hundred and seventy-eight and 97/100 Dollars (\$4,778.97). On or about February 7, 1914, said check was presented for payment and was dishonored and no part thereof has been paid. The following is a copy of said check and the same was duly indorsed to Muller, Schall & Company;

28 Rfs. 25000.00/100.

New Orleans, La., January twenty-fourth, 1914.

Pay to the order of Edw. Duplantier, Twenty-five thousand Francs.

To Banque de Report de Fonds Public et de Depots, Antwerp, Belgium.

No. 2675.

A. LEMORE & CO."

At and before the time of the purchase of said checks by Muller, Schall & Company, said bankrupt, Edward E. Carriere, with full knowledge of the true facts, represented to Muller, Schall & Company for the purpose of inducing them to purchase said checks that his said partnership, the drawer of said checks was a solvent concern with large assets in excess of its liabilities and engaged in a legitimate and profitable business, and presented to Muller, Schall & Company a written statement showing very large assets in excess of liabilities and Muller, Schall & Company purchased said checks in full reliance on and belief in said representations and the facts so represented and in ignorance of the true facts, all to their damage in the sum of Fourteen thousand four hundred five and 93/100 Dollars (\$14,405.93), with interest from January 28, 1914. In truth and in fact, as deponent is informed and believes, said partnership was at all the times in question insolvent, with assets much less than its liabilities and was doing an unprofitable business largely based on misrepresentation,

and said written statement was false, all of which said Albert Le More and Edward E. Carriere well knew; and said transactions were wholly false and fraudulent to their knowledge and were intended to defraud Muller, Schall & Company.

That no part of said debt has been paid and there are no set-offs or counterclaims to the same and no note has been received for the said debt nor any judgment rendered thereon. That save as aforesaid, deponent has not nor has his said firm nor any person by their order or to its knowledge or belief of deponent for their use had or received any manner of security for said debt whatever and no security is now held.

29 That Muller, Schall & Company do not waive any right of action or other right whatever of any kind, nature or description that they now have against the bankrupt partnership or against Albert Le More or against any other person, and they do not waive any right to sue or proceed against said partnership or Albert Le More or Edward Carriere alone or with others upon contract or for fraud or deceit or for any matters arising out of or connected with the transactions set forth in this proof of debt or to recover and sue upon the bills of lading above mentioned.

(Sig.)

C. MÜLLER.

Subscribed and sworn to before me this 4th day of May, 1915.

(Sig.)

EUGENE CONGLETON,

[SEAL.]

Notary Public, New York County, New York.

Petition of Trustees and Order of Referee Thereon Authorizing Them to Pay Dividend of 3% to Muller, Schall & Co., etc.

Filed Before Referee June 30, 1915. Filed in Court August 14, 1916,
at 11:45 A. M.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

In the United States District Court in and for said District, New Orleans Division.

No. 1880. In Bankruptcy.

In the Matter of A. LE MORE & COMPANY and ED. E. CARRIERE & COMPANY.

To the Honorable William A. Bell, Referee in Bankruptcy:

The petition of Frederic Camors, R. M. Walmsley, and Nicholas Riviere, Trustee in Bankruptcy of A. Le More & Company and Ed. E. Carriere & Company, with respect represents:

30

1.

That Muller, Schall & Company of New York, have, since the preparation of the original dividend sheet herein, filed proofs of

claims against both the individual and partnership estates in this matter in the sum of \$70,050.00. That petitioners purpose to contest and make a rule to expunge the claim as against the individual estates, but that the claim against the partnerships is well founded and supported by the books and by the drafts exhibited to the Referee. Petitioners have agreed, subject to the approval of the Court, to pay to Muller, Schall & Company the dividend (3%) heretofore paid to the other creditors who have proven claims against the partnership estates, without prejudice and reserving specifically petitioners' right to contest the claim of Muller, Schall & Company against the individual bankruptcy estates.

2.

Petitioners show that the regular monthly bills for their office expenses are now due as per the attached list, and they desire authority to pay the same.

3.

Petitioners further represent that bills have been presented for the following items as costs of administration, which bills were incurred with the authority of this Court, and which petitioners believe should be paid without awaiting the filing of a dividend sheet:

Cost of securing from the liquidator of the Liverpool Stave Company copies of the correspondence exchanged between the Liverpool Stave Co. and Le More & Co.	\$50.00
Rushmore-Bisbee & Stern—Professional services in securing discharge of R. M. Walmsley, Receiver in New York. . . .	267.38
A. E. Washburn for estimating timber on "Galvit Tract" (less than)	100.00
31	
Janvier & Co., Ltd., Insurance premium on #1304 Carrollton Ave.	75.00
Geo. Munster, for counting staves received from Zion, La. . .	5.00
Markwick, Mitchell & Peat, accountants, for auditing account of Liverpool Stave Co.	300.00
Richard T. Golding—copy of official notes of examination of Mr. Porter (less than)	15.00

4.

That on the books of the Company there appears an item of \$314.04 due by Reverend F. Rouge for taxes paid by the former on lots in the name of the latter at Birmingham, Alabama. That the said Rouge denies indebtedness, claiming that this sum was compensated by services rendered to him to Le More individually under agreement, but to avoid a lawsuit, he is willing to pay \$250.00, which

petitioners believe it advisable to accept rather than incur the expense and uncertainty of litigation.

Wherefore, Petitioners pray for authority to pay Muller, Schall & Company a dividend of three per cent on the terms above set out, and for authority to pay the bills hereinabove referred to. And your petitioners further pray for authority to accept \$250.00 from Reverend F. Rouge in satisfaction of the claim against him for taxes paid on the lots in Birmingham.

(Signed)

"

HALL, MONROE & LEMANN,
D. B. H. CHAFFE, *Attys.*

Order.

The foregoing petition and the premises considered, let petitioners be, and they hereby are, authorized to pay to Muller, Schall & Company a dividend of three per cent as above set out and also to pay the office expenses and costs of administration incurred as above set out.

Let petitioners be, and they hereby are, further authorized to accept from Reverend F. Rouge \$250.00 in satisfaction of the claim against him for taxes paid at Birmingham, Alabama.

(Signed)

PHILIP GENSLER, Jr., *Referee.*

New Orleans, La., June 30, 1915.

Monthly Bills.

J. F. Couret, Salary for June.....	\$150.00
G. C. Lafaye, Salary for June.....	125.00
L. G. Peytavin, Salary for June.....	40.00
Miss E. Barrow 26 days at \$2.00.....	52.00
Office Rent for June.....	93.00
N. O. Ry. & Lt. Co., for June.....	5.34
Cumberland Telephone Co. for June.....	15.00
Combination Toilet Stand Co., for June.....	1.00
M. J. Harrigan, Ice for June.....	1.30
Petty Cash To replenish.....	25.00
Garcia Sty. Company.....	7.15

33 *Petition of Trustees and Order of Referee Thereon to Show Cause Why the Claim of Muller, Schall & Co. Against the Individual Estates of Albert Le More and Ed. E. Carriere Should Not Be Expunged.*

Filed Before Referee February 1, 1916, as of Date July 15, 1915.

Filed in Court August 14, 1916, at 11.45 A. M.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

In the United States District Court in and for said District, New Orleans Division.

#1880. In Bankruptcy.

In the Matter of A. LE MORE and ED. E. CARRIERE, Individually and as Copartners, Doing Business under the Firm-name- of A. Le More & Company and Ed. E. Carriere & Company, Bankrupts.

To the Honorable William A. Bell, Referee in Bankruptcy.

The petition of Frederic Camors, Nicholas Riviere and R. M. Walmsley, Trustees in Bankruptcy of A. Le More & Company and Ed. E. Carriere & Company, with respect represents:

That Muller, Schall & Company have filed a proof of claim herein against the individual estates of Albert Le More, and Ed. E. Carriere, which petitioners believe should be expunged, the claim of the said Muller Schall & Company being properly proven only against the partnership estate, and not against the individual estates.

Wherefore, Petitioners pray that the said Muller Schall & Company through their attorneys of record, be notified to show cause on the 22nd day of July, 1915, why their claim against the individual estates of Albert Le More and Ed. E. Carriere should not be

34 expunged, and stricken out.

And for all general relief.

(Sig.)

HALL, MONROE & LEMANN,

(Sig.)

D. B. H. CHAFFE,

Attys'.

Order.

The foregoing petition and the premises considered, let Muller Schall & Company through their attorneys of record, be, and they hereby are, notified to show cause on the 22nd day of July, 1915, why their claim against the individual estates of Albert Le More and Ed. E. Carriere should not be expunged and stricken out.

(Sig.)

WM. A. BELL, *Referee.*

New Orleans, La., July 15, 1915.

Testimony on Rule of Trustees to Have the Claim of Muller, Schall & Co. Against Albert Le More and Ed. E. Carriere Individually Stricken Off.

Filed Before Referee February 1, 1916, as of Date January 27, 1916

Filed in Court August 14, 1916, at 11:45 A. M.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

No. 1880.

In the Matter of ALBERT LE MORE and EDWARD E. CARRIERE, Individually and as Co-partners, Conducting Business under the Firm Name of A. Le More & Company and Ed. E. Carriere & Company, Bankrupts.

Testimony and Notes of Evidence in the above entitled and numbered cause, taken in open Court, before the Honorable William A. Bell, Referee in Bankruptcy, at his office, No. 407
35 Carondelet Street, New Orleans, Louisiana, on Friday, November 26, 1915, on rule of the Trustees to have the claim of Muller Schall & Company against Albert Le More Individually Stricken off.

Appearances:

Messrs. C. P. Fenner and Eugene Congleton, Representing Muller Schall & Company.

H. Generes Dufour, Esq., Representing Canal Bank and Trust Company.

Messrs. Monte M. Lemann and D. B. H. Chaffe, Representing Trustees of A. Le More & Company and Ed. E. Carriere Company.

Michel Provosty, Esq., Representing bankrupts.

Reported by Harry B. Caplan, with Gassie & Beary, Shorthand reporters.

ED. E. CARRIERE, being first duly sworn by the Referee, testified as follows:

Direct examination.

Mr. Lemann:

Q. Mr. Carriere, you are Ed. E. Carriere, one of the individual bankrupts herein?

A. Yes, sir; I am.

Q. Mr. Carriere, I will ask you to examine the proof of claim filed in this matter in behalf of Muller Schall & Company against Albert

Le More, individually. Examine the items forming the basis of that claim? (Hands documents to witness.)

A. Yes, I assume those figures are correct.

Q. I am not interested, at the moment, in the correctness of the figures. I observe that the claim is based upon certain drafts and checks purchased by Muller Schall & Company. Were the sales to Muller Schall & Company made in New Orleans, or New

36 York?

A. New York.

Q. By whom were they made?

A. By Mr. Trippe.

Q. You refer to Mr. T. C. Trippe?

A. Yes sir.

Q. Was Mr. Trippe agent of Le More & Company, or agent of Le More, individually?

A. A. Le More & Company.

Q. Was he the agent of Le More & Company, or the agent of Ed. E. Carrere, individually?

A. A. Le More & Company.

Q. Where was Mr. Le More at the dates upon which these transactions took place, Mr. Carrere?

A. He was in Europe.

Q. How long previously had he been in Europe?

A. He had been there quite a while; I suppose since March, probably.

Q. Since the preceding March?

A. Yes, sir.

Q. Where were you?

A. I was in New Orleans.

Q. Mr. Carrere, did Mr. Le More, personally, get any of the money advanced by Muller Schall & Company upon the purchase of these drafts and checks?

A. No sir.

Q. To whom did the money go?

A. The money was remitted by cable to Europe to meet payments of drafts maturing to Gairard and others.

Q. Whose drafts, Mr. Carrere?

A. A. Lemore & Company, and probably Ed. E. Carrere and Company.

Q. Were those transactions by Mr. Trippe in the regular course of the partnership business?

A. Yes sir.

Q. Did you, Mr. Carrere, get any of the money advanced by Muller Schall & Company, upon the purchase of these drafts and checks?

A. No, sir.

37 Cross-examination.

Mr. Congleton:

Q. Mr. Carrere, did you ever send to Mr. Trippe a statement purporting to be a statement of the financial condition of A. Le More & Company?

A. I don't think that I should answer any question as to any statements sent by the firm of A. Lemore & Company, in view of the fact that I am now under indictment in the Federal Court.

Mr. Congleton: If the Court please, I move to strike out the entire testimony of this witness. If he does not submit to cross examination of the matters developed by the testimony in chief, I think the whole testimony — be stricken out.

NOTE.—Here followed a general argument between counsel and the Court, after which the Court stated he would adjourn the hearing until the next day, Saturday, November 27th, 1915, at eleven o'clock A. M. when he would make his ruling.

Resumption.

Saturday, November 27, 1915.

The further taking of testimony in the above entitled and numbered cause, was resumed this Saturday, November 27, 1915, at eleven o'clock A. M. pursuant to adjournment last noted, before the Honorable William A. Bell, Referee, the same counsel in attendance for all parties.

The Referee: The Referee being of the opinion that the motion to strike out the original testimony of Mr. Ed. E. Carriere, under the circumstances of this case, well founded, the motion granted, and the said testimony is eliminated.

38 Mr. Lemann: To which ruling of the Referee counsel for the Trustees objects and excepts, and will, in due course, reserve his formal bill.

GUY C. HARRIS, being first duly sworn by the Referee, testified as follows:

Direct examination.

Mr. Lemann:

Q. Mr. Harris, you were in the employ of A. Le More & Company prior to their failure, were you not?

A. Yes sir.

Q. Are you familiar with the items described in the proofs of claim filed by Muller Schall & Company?

A. Yes, sir; I am familiar with it.

Q. Mr. Harris, by whom were those items of drafts and checks sold to Muller Schall & Company?

Mr. Congleton: I object, if the Court please. I think that the witness is about to be asked to give hearsay testimony, and I would like to get a little preliminary cross-examination to bring that out, so that I may not waive my objection.

The Referee: I overrule the objection.

Mr. Congleton: Bill of exceptions noted.

Mr. Lemann: Read the question.

Q. (Read by the reporter.) Mr. Harris, by whom were those items of drafts and checks sold to Muller Schall & Company.

A. They were sold by Trippe—Mr. Trippe.

39 Q. Who was Mr. Trippe?

A. He represented A. Lemore & Company, in New York.

Q. How do you know that, Mr. Harris?

A. Well, he was employed by the firm, and he opened up the office of A. Lemore & Company, in Bowling Green Building.

Q. Did you handle any, or see any, of the correspondence exchanged between Mr. Trippe and the firm?

A. Yes, sir, I saw, probably, all of it.

Q. Was that part of your duty?

A. Yes, sir; I used to read that correspondence.

Q. Was it any part of your duty to keep track of what was done with the proceeds realized upon the sale of these items?

A. In a general way, only.

Q. Do you know what was done with the proceeds of these particular drafts and checks described in the proof?

A. It was customary for him to make remittances.

Mr. Congleton: If the Court please, we will concede that this money went to the firm account. We do not contend that either of the partners received any of the proceeds of the discounts of these drafts, personally, except as they were received by the firm of A. Lemore & Company.

Mr. Lemann:

Q. Mr. Harris, at the dates upon which these transactions described in this proof of claim took place, where was Mr. Lemore?

A. He was in Europe.

Q. How long had he been there, do you know?

A. About March of 1913.

Q. Where was Mr. Carrere?

A. He was in the New Orleans office.

Q. Was the firm in the habit of sending drafts and checks to Mr. Trippe, in New York, for sale?

40 A. How do you mean?

Q. Was it done only in the case of Muller, Schall & Company?

A. Oh, no; it was done with all the other buyers of drafts in New York.

Q. In the regular course of business?

A. Yes, sir.

Q. Did Mr. Lemore know that any bills of lading were attached to these drafts?

Mr. Congleton: I object to that, if the Court please, as calling for Mr. Lemore's knowledge of a fact which this witness cannot testify he knew, or did not know.

The Referee: I sustain the objection.

Mr. Lemann:

Q. Was any report made by the office to Mr. Lemore as to whether the particular drafts sent Trippe for sale had bills of lading attached to them, or not?

A. No, sir; I don't think so. I think that he was simply advised that sales were made to certain banks, of certain amounts.

Q. At the time that these drafts and checks were sent to Trippe for sale, Mr. Lemore, as I understand you to say, was then in Paris?

A. Well, his headquarters were in Paris.

Q. He was not on this side of the water?

A. Oh, no; he was in Europe.

Q. Did you handle the correspondence long enough to know how long it would take, in the ordinary course, for a letter of advice from New Orleans, to reach the other side of the water?

A. I think the average was about thirteen (13) days.

Q. Were all the drafts sold by Trippe, drafts with bills of lading attached?

Q. Some of them were clean drafts, as I understand?

A. Yes, sir.

41 Mr. Congleton: No cross-examination.

Mr. Lemann: I will ask leave to offer extracts from the records of the partnership of A. Lemore & Company, showing precisely the disposition made of these monies advanced by Muller, Schall & Company. I offer, also, the appraisalment of the firm estate, the appraisements of the individual estates, and a tabulation of the proofs of claim made against the individuals and firm estates.

Mr. Congleton: I object to the offer on the ground that same is irrelevant and immaterial.

The Referee: I maintain the objection.

Mr. Lemann: I will reserve a bill, with the right to annex my offers to the said bill.

42

Trustee's Exhibit.

Filed Before Referee February 1, 1916, as of Date December 27, 1915. Filed in Court August 14, 1916, at 11:45 A. M.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

In the United States District Court in and for said District, New Orleans Division.

No. 1880. In Bankruptcy.

In the Matter of A. LE MORE & COMPANY and ED. E. CARRIERE & COMPANY, Bankrupts.

On Rule of Trustees to Expunge Proof of Muller, Schall & Company Against the Individual Estates.

Summary of Appraisements of, and Claims Proven Against, the Firm and Individual Estates, Offered upon Hearing by Counsel for the Trustee.

Firm Estate:

- | | |
|--|--------------|
| (1) Firm assets as appraised..... | \$313,887.47 |
| (2) Claims proven and allowed against the firm.. | 3,213,947.44 |

Albert Le More's Individual Estate:

- | | |
|---|-----------|
| (1) Le More's individual assets as appraised..... | 39,403.80 |
| (2) Claims against Albert Le More's individual estate (excluding claim of Muller-Schall & Company for \$70,070.00 which is being contested), as proven and allowed..... | 37,084.98 |

43 Ed. E. Carriere's Individual Estate:

- | | |
|---|-----------|
| (1) Carriere's individual assets as appraised..... | 25,443.88 |
| (2) Claims proven and allowed against the Ed. E. Carriere individual estate (excluding claim of Muller, Schall & Company for \$70,050.00 which is being contested.....) | 1,526.79 |

(On Letter Head of Hall, Monroe & Lemann.)

Law Offices, New Orleans, La.

January 31, 1916.

Hon. William A. Bell, Referee in Bankruptcy, City.

DEAR SIR: I am handing you herewith, for inclusion in the record, a tabulation of the appraisement of and claims proven against the

firm and individual estates which I offered in evidence and which was ruled out by the Court, but which I ask leave to annex to my exception. I assume that no formal bill of exceptions is required.

I will appreciate it if you will file the inclosure.

Yours very truly,

(Sig.)

MONTE. M. LEMANN.

M. M. L./M. M. P.

Inc.

- 44 *Referee's Judgment on Trustees' Rule to Expunge Claims of Muller, Schall & Co., Against the Individual Bankruptcy Estates of Albert Le More and Ed. E. Carriere.*

Filed by Referee May 25, 1916, at 10 A. M. Filed in Court August 14, 1916, at 11:45 A. M.

In the District Court of the United States, Eastern District of Louisiana, New Orleans Division.

No. 1880. In Bankruptcy.

In the Matter of ALBERT LE MORE and EDWARD E. CARRIERE, Individually and as Co-partners, Conducting Business under the Firm Names of A. Le More & Company et Ed. E. Carriere & Company.

Referee's Judgment on Trustee's Rule to Expunge Claims of Muller, Schall & Company Against the Individual Bankruptcy Estates of Albert Le More and Edward E. Carriere.

On the 8th day of May, 1914, Albert Le More and Ed. E. Carriere, individually and as co-partners doing business under the firm names of A. Le More & Company and Ed. E. Carriere & Company, were adjudicated bankrupt. On the 8th day of May, 1915, the last day of the year allowed by law, Muller, Schall & Company filed a proof of claim against the partnership, a separate proof of claim against the estate of A. Le More individually, and a third proof against Ed. E. Carriere, individually. Each of these proofs was in the sum of \$70,050.00, and all of them were based upon the same transactions. These transactions consisted of the purchase by Muller, Schall & Company (who will hereinafter for convenience, be referred to as the claimants), of drafts and checks drawn by the bankrupt partnership on drawees in Europe, which were dishonored at their maturity. None of these drafts bore the individual signature or indorsement of either of the individual partners. They were all purchased by the claimants from one Trippe, who was the agent of the co-partnership in New York. These drafts were sold to the claimants by Trippe in the regular course of the partnership business, and the proceeds of that sale inured entirely to the partner-

ship; it is admitted that neither of the partners received any of the proceeds.

Claimants herein urge their rights for proof and for recovery not only against the partnership estate but also against the individual estates, upon the allegation that the claimants were induced to purchase the drafts by fraudulent representations. The proofs of claim set up that these representations consisted of false statements as to the firms' financial condition, and in the annexation to the drafts, of bills of lading, which in fact, represented no actual shipments. All of the transactions took place in New York and were handled entirely through the partnership agent there, Albert Le More being at the time in Paris, where he had been for many months prior to the occurrence of these transactions, and Ed. E. Carriere being in New Orleans.

The Trustees recognize the right of Muller, Schall & Company to make proof against the partnership estate of A. Le More & Company (otherwise known as "Ed. E. Carriere & Company") but in this rule to expunge they now resist the attempt at double proof against the partnership estate and the individual estates, on the following grounds:

First. That the transactions upon which the claimants' rights are based were entirely partnership transactions, and to permit claims against the individual estates to be based thereon, would do violence to the whole theory of the bankruptcy act with regard to the distribution of partnership and individual assets.

46 Second. That the claims against the individual estates cannot be proved against those estates in contract, because the only contract was with the partnership; that the claims cannot be proved in quasi contract, or implied contract, because there was no enrichment of the individual estates, hence no ground for the implication of a promise by the individuals; and that they are not provable as claims in tort, because such claims, not reduced to judgment, are not provable.

Claimants defend their right to double proof upon the ground that their claims against the individual estates arise out of liabilities in tort for damages suffered because of deceit and fraud of the individual partners in accordance with the facts as above stated. The evidence establishes the purchase of the drafts from the agent of the partnership in New York, while Le More was in Paris and Carriere in New Orleans and shows that neither of these bankrupts were individual indorsers or signers of the drafts, but that the whole transaction was negotiated in the name of the firm or co-partnership of A. Le More & Company. It is admitted, as above stated, that the proceeds of the alleged fraudulent transaction went only to the firm's account and not to either of the partners individually. Upon these facts, counsel for claimants have conceded in argument, that the contested claims are not based upon implied or quasi contract, the transaction being entirely a partnership transaction, inuring entirely to the benefit of the partnership as such. Nor is it contended that these contested claims arise from express contract with either of the partners, neither of them having signed or indorsed the

accepted drafts. Under these facts, clearly established, the issues herein are narrowed to the sole question of law, as to the provability of such claims as claims in tort for fraud, under the bankruptcy act of 1898 and its subsequent amendments.

Counsel for claimants contend that the double proof herein at tested is justified under the amendment of 1903 to Section 17 of the Act, which makes such claims, founded upon tort for fraud and deceit, not only non dischargeable debts, but also provable
47 debts, under the evident attempt of Congress to amplify by said amendment the category of "debts which may be proved" under Section 63 of the Act. The authorities cited by claimants above all others in support of this argument are *Clarke vs. Rogers* 228 U. S. 534 and *Freind vs. Talcott* 228 U. S. 27, rendered since the amendment of 1903 to Section 17, and also *Crawford vs. Burke* 195 U. S. 176 and *Tindle vs. Birkett* 205 U. S. 183, decided prior to said amendment.

Passing momentarily from the consideration of these decisions it is proper to note the sections of the act pertinent to this controversy, as they now exist and under which double allowance of proof is now sought by claimants.

Section 17 of the Act as amended in 1903 reads as follows:

"Debts Not Affected by Discharge.

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, County, district or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or wilful and malicious injuries to the person or property of another; or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation, (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Debts Which May Be Proved.

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time
48 of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute

after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less cost incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Abundance of jurisprudence of the highest Federal authority has directed that the foregoing provisions of the act must be construed together in determining, in many instances, the dischargeability or not, of certain provable debts. It cannot be questioned that the wisdom of, and necessity for the 1903 amendment to Section 17 was only determinable after the fullest consideration by Congress of the relation of these sections to each other, as established by judicial construction prior to the amendment.

In determining the soundness or not of the Trustee's action to expunge, it is likewise imperative to consider the present relation of these sections of the act in the light of jurisprudence, prior and subsequent to the 1903 amendment. Careful and exhaustive examina-

tion has resulted in the conclusion that since the amendment
49 aforesaid, the Supreme Court of the United States has rendered no decision in support of claimant's contention that "liabilities" for damages arising solely in tort, and not reduced to judgment prior to the filing of a petition in bankruptcy is now made by the effect of said amendment upon Section 63, a provable claim in bankruptcy. In fact it may be said here, as was recently stated by the United States Circuit Court of Appeals for the Fifth Circuit, while considering a case in which *Clarke vs. Rogers* had been cited in respondent's brief, that:

"So far as we are advised the proposition has not been definitely settled by the Court whose decisions are controlling" *Jackson vs. Wauchuba Mfg. Co.*, 230 Fed. 410, 36 Am. B. R. 410."

In *Crawford vs. Burke*, 195 U. S. 176, *Burke* sued *Crawford* and *Valentine*, members of a stock broker's firm, in trover, to recover damages for fraudulent conversion of his reversionary interest in certain shares of Metropolitan Traction Stock. Defendants pleaded a discharge in bankruptcy, as a bar to the suit. Plaintiff responded that under Section 63 (a) of the bankruptcy act said claim was not a provable claim because even if same arose under a contract express or implied, that he had elected to sue in trover for fraudulent conversion, and for the additional reason that under Sec. 17 (4) of the act, the claim was created by fraud and misappropriation which rendered it a non-dischargeable debt, though the fraud was not that of an officer or of any one acting in a fiduciary capacity. Held: That in as much as the debt had arisen under a contract express or implied, within the terms of section 63 (a), it was a provable debt, notwithstanding the fact that plaintiff had elected to sue in trover

for fraud, and that not having been reduced to a "judgment" before bankruptcy and not arising from acts committed by defendants in an official or fiduciary capacity that the plea of discharge was a bar to the action. *Tindle et al. vs. Birkett*, 205 U. S. 183. In this

50 case plaintiffs were induced by Birkett's false representations to sell him large quantities of merchandise. They sued a defendant in damages for value of the goods sold under contract. Defendant pleaded a discharge in bankruptcy. Plaintiffs contended such a plea untenable because suit was founded upon a claim not provable in bankruptcy and hence not dischargeable. Held: Claim was upon express contract provable under Section 63a (4) and to which a plea of discharge would hold declaring this case to be identical with *Crawford vs. Burke*.

Freind et al. vs. Talcott 228 U. S. 27: Talcott was induced to sell goods to the commercial firm of Freind et al. Upon the false financial statement of this firm, circulated to the trade and to Talcott, through a commercial agency. The firm went into bankruptcy. Talcott participated in a composition-dividend and at the same time opposed the bankrupt's discharge by way of composition, upon the ground of fraud, as above stated. Talcott's opposition was overruled and the firm's composition-discharge was granted. A year later Talcott sued the firm for damages suffered by him because of deceit practiced in procuring the sale of goods on credit. Held: That where the debt is of such a nature that it is within the power of the creditor to elect to enforce his right as an obligation arising in contract, although he might have sued for damages in tort, that the debt was a provable debt which might enjoy not only the benefit of dividends in bankruptcy, but also the superadded benefit of exemption from the effect of the discharge in bankruptcy. Upon this theory Talcott's suit was maintained and the plea of discharge dismissed.

Clarke vs. Rogers 228 U. S. 540. This was a case where the bankrupt Shaw, an embezzler of several trust funds, of which he was trustee, had within four months of his bankruptcy and while insolvent, used his own funds to reimburse one of these trust estates himself as trustee thereof. When his bankruptcy trustee, Rogers, sought

51 to recover these preferential payments under section 60e of the bankruptcy act, it was argued by Clarke, the bankrupt's successor in the preferred trust estate, that no recovery could be made from said trust estate because it was not a creditor holding a provable claim in bankruptcy, within the definition of the bankruptcy act Sec. 63a (4), that is, upon a claim founded on contract express or implied, the liability of Shaw to said trust estate (aside from his liability on bond) having been in the nature of a pure tort liability which could not be waived and suit upon contract liability entered. Held: That irrespective of Shaw's liability upon his bond as trustee of the trust estate, there was a claim in favor of said trust estate entirely provable in the bankruptcy proceeding under Sec. 63a (4), being founded upon a debt arising under an implied contract, involving an implied obligation of the defaulting bankrupt as testamentary trustee to return to the trust estate the

funds by which he had been unjustly enriched at the expense of the trust estate.

In the case of *Clark vs. Rogers* it was argued by counsel for the preferred trust estate, as is now argued by counsel for trustees of these individual bankruptcy estates, that the preferred trust estates never had a provable claim against the bankrupt Shaw, because said claim was in the nature one of a pure tort liability for deceit; not arising upon any contract express in fact, or implied in fact, but solely upon a claim out of which a contract might be implied in law. It was, therefore, contended that under such conditions of fact, no fiction of the law could be resorted to, whereby actionable tort might be waived and suit upon contract entered. To meet the well considered and leading authorities of *Crawford vs. Burke* and *Tindle vs. Birkett* it was further stated that the full force of the decisions had been explained and limited by the later decision of *Grant Shoe Co. vs. Laird* 212 U. S. 445, inasmuch as in this latter case the Court had distinctly ruled that provable claims in bankruptcy were restricted to only such claims as arose from contracts

express or implied in fact and could not include claims which
52 were based solely upon contracts implied in law only. Close study and examination of all the foregoing cases, show however that such an argument was predicated upon an erroneous interpretation of the facts governing the *Grant vs. Laird* decision, in which there was a distinct contract of warranty, a fact which could not and did not result in any such restricted conclusions of law as were contained for in the case of *Clarke vs. Rogers*. On the contrary in this latter case the Court distinctly said that the appellant (*Clarke*) in order to bring his case within such a restricted view of the law as he contended was the ruling in the *Laird* case, would have to establish as a fact that no contractual obligation or relation existed in his case. It then proceeded to a finding that in *Clarke vs. Rogers* case there was an obligation of "contractual character" arising from the relation between the trustees Shaw and his *sectui-que* trust, of as much import and quite as enforceable at law as the express contract of warranty which existed in *Grant vs. Laird*. It was at this point that the Court gave expression (purely obiter) that it might be possible, though not in the case then before it, to sue upon contract implied in law only, where the tort unlike that now under consideration could be waived.

It is beyond question that the claims upon which claimants would now recover are based solely upon tort arising from the alleged fraud as above set forth. There was no contract with either *Le More* or *Carriere*. Neither of them signed, nor indorsed the drafts individually, nor has it been shown that either of them received or used the proceeds derived from the fraudulent transaction, all of which has been shown to have gone only into the assets of the partnership, in whose name only was the fraudulent transaction consummated. There was no unjust enrichment of the individual partners, nor were there any contract or quasi contract, express or implied, as between these individuals and complainants. It is only under such

53 conditions that the right of election of waiving tort and suing upon implied or quasi contractual relation, will apply. This was made plain in the case of *Clarke vs. Rogers* where the Court said:

"That some torts may be waived and be the basis of provable claims, is decided in *Crawford vs. Burke* 193 U. S. 176."

It cannot be seriously contended that all claims arising out of tort are provable though unliquidated and though founded upon tort pure and simple.

The doctrine of quasi contracts has its origin in the Roman Law and is well founded in both systems of Civil and Common Law. Revised Civil Code of Louisiana, Title V., Article 2292, et seq., Article 2301 of the Code provides that:

"He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it."

and again it is provided by Article 2315, that:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

In *Morgan's Louisiana and Texas R. R. and S. S. Co. vs. Stewart* 119 La. 394, the Supreme Court of Louisiana has recognized the right of one suffering damages from fraudulent acts of another to waive the tort and sue upon contract, but only when unjust enrichment has resulted from the transaction which in itself has arisen during the existence of contractual relations between the parties. But as heretofore noted there has never been in fact any contractual relation, express or implied, between complainant and these individuals, against whose individual bankruptcy estates unliquidated claims in tort, are now urged.

54 It is argued by counsel for complainants that if no part of Section 63a of the act will admit to proof the debts or claims now under consideration, that paragraph (b) of said section clearly implies that such claims when liquidated are provable. From this argument it is claimed that paragraph "b" supplements and enlarges the scope of provable claims, which would otherwise embrace only such claims as are enumerated in paragraphs "a" of section 63. But such contention has been definitely rejected by the Supreme Court in *Dunbar vs. Dunbar*, 190 U. S. 340, where the Court said:

"This paragraph b, however, adds nothing to the class of debts which might be proved under paragraph a of the same section."

This language has not in any manner been qualified nor limited, as counsel contends, by the more recent decision of the same Court in *Central Trust Co. vs. Chicago Auditorium Association*, 240 U. S. 581. In this later case the Court finding that the effect of a bankruptcy adjudication was to cause an anticipatory breach of a written executory agreement, proceeded to hold that:

"The claim for damages by reason of such breach is founded upon

a contract express or implied within the meaning of Section 63a (4) and the damages may be liquidated under Section 63b."

Continuing to distinguish the facts of this case from those of *Dunbar vs. Dunbar*, but in no manner qualifying its doctrine, the Court further said:

"The authority of that decision cannot be extended to cover such a case as the present. Here the obligation of the bankrupt was clear and unconditional."

See, also the very recent decision of the Court of Appeals for the Ninth Circuit, *Moore vs. Douglas* 230 Fed. 400, where it was said:

55 "It is thoroughly established that paragraph "b" does not enlarge the class of debts which may be proved under paragraph "a"; it does, however, permit an unliquidated claim to be liquidated as the Court may direct, provided always such claim is one within the provisions of 63a."

Complainants' counsel admit, in supplemental brief, as has been exhaustively shown by counsel for trustee, that in none of the three Federal Bankruptcy acts of this country, preceding the act of 1898, have claims such as are before us, unliquidated and founded solely upon tort, been recognized as provable claims. This is clearly shown by the following citations presented on behalf of trustees herein, to-wit:

Under the Act of 1800: *Duson vs. Murgatroyd*, Fed. Cases 4199.

Under the Act of 1841: *Doggett vs. Emerson*, Fed. Cases 3962.

Under the Act of 1867: *In re Schwartz* Fed. Cases 12502. *In re Lachmeyer*, Fed. Cases 7966. *In re Schuchardt*, Fed. Cases 12483. In this last case it was attempted to prove a claim in the bankruptcy estate of Schuchardt, whose firm of Schuchardt & Son had, by fraudulent misrepresentations of one of its members induced the claimant to sell to the firm on credit. Under these facts the Court held as follows:

"Independently of this, the claim set up is a claim for damages for a tort, and is not a claim provable in bankruptcy. If it had been put in judgment against Mr. Schuchardt, individually, before the adjudication, the judgment might have been proved. The claim is not one made provable by sections 5067 to 5071 of the Revised Statutes. It is not a claim created by contract and, therefore, is not a debt within section 5067. Nor is it, within that section, a demand for or on account of goods or chattels wrongfully taken, converted or withheld. Nor is it a claim for unliquidated damages arising out of a contract or promise, or on account of goods or chattels wrongfully taken, converted or withheld. Nor is it a contingent debt or a contingent liability, within Section 5968.

56 Nor can it be proved under any one of the other three sections above named. No contract can be implied between Agnew & Sons and Mr. Schuchardt, as might be the case if Mr. Schuchardt had received from Agnew & Sons money which ex aequo et bono ought to be refunded. The parties held no such relation as raised the implication

in law, of a contract. Agnew & Sons paid no money to Mr. Schuchardt or to Schuchardt and Sons or to any agent of either. Therefore, no action for money had and received could lie against Mr. Schuchardt. The action would be for deceit, for a tort, and would sound in damages, and they would not be damages arising out of a contractor or promise. The claim, therefore, is not a provable one.

The proof of claim must be expunged."

The Supreme Court of the United States under the Act of 1867, though not as yet under the Act of 1898, has furnished positive and clear authority against the provability in bankruptcy of unliquidated claims arising in tort for fraud or deceit. See *Strong vs. Bradner*, 114 U. S. 555. It is contended by counsel for the claimants that this, and similar cases arising under the Act of 1867 have been overruled by the decision of *Crawford vs. Burke* 195 U. S. 176, in which were discussed the relation of Sec. 17 to section 63 of the Act of 1898, before the amendment of 1903 to Sec. 17. In the former case the relation of Sec. 33 to Sec. 19 of the Act of 1867 corresponding respectively to the aforementioned sections of the Act of 1898, were also discussed and it was there plainly intimated that Sec. 33 in no manner amplified or amended the class of provable debts enumerated in the Act of 1867. The consideration already given above to the ruling made in *Crawford vs. Burke* shows that counsel's contention is not well founded and that these decisions

are entirely reconcilable. Abundant, able and well considered, though not final authority, in support of trustees' contention, is found in numerous District and Appellate Federal Court decisions, rendered under the Act of 1898, prior and subsequent to the 1903 amendment now under discussion. The leading case in which an exhaustive, direct and lucid ruling has been fully, rendered upon the exact issues now under consideration is, *In re United Button Company*, 140 Fed. 495, affirmed on appeal by the Circuit Court of Appeals for the Third Circuit, also in *Brown and Adams vs. United Button Company*, 149 Fed. 48. See also in *re New York Tunnel Company*, 159 Fed. 688; *In re Southern Steel Company*, 183 Fed. 498; *Reynolds vs. New York Trust Company*, 188 Fed. 611.

In the case of the *United Button Company* a corporation adjudged bankrupt under an involuntary petition, it was attempted under Section 63b, of the bankruptcy Act, to have liquidated and allowed by the bankruptcy Court an unliquidated claim for damages "willfully and maliciously" inflicted upon complainants, because of the damaging effect upon its stock of wool by heat emanating from the neighborhood factory operated by the bankrupt corporation before adjudication, and by its trustees after bankruptcy. The Trustees contended in that case, as is contended here, that the claim for unliquidated damages resulting from injury to the property of another, not reduced to judgment, arising only in tort, and not from any contractual or quasi-contractual relation, was not a provable claim under the provisions of Sec. 63a of the Act. It was argued there, as here, that Section 17 as amended rendered such a claim, in connection with Section 63, a provable claim, nothing can be added to

the most lucid and enlightening opinion of Judge Bradford, upholding trustee's contention. The following lengthy quotation from the opinion is justified because of its peculiar application to the case before us:

"Section 1 provides that the word 'debt' shall include any debt, demand or claim provable in bankruptcy," and section 63a (30 Stat. 563, U. S. Comp. St. 1901, p. 3447) contains an enumeration of debts, demands and claims made so provable, and provides that "debts of the bankrupt may be proved and allowed against his estate which are (4) founded upon *and* open account, or upon a contract expressed or implied." Clearly the alleged claim would not be provable by virtue of section 63a, considered independently of the provisions of section 63b and section 17, unless and save in so far as it is founded upon a contract express or implied." The claim, however, if any exists, is not based upon nor does it grow out of an expressed or implied contract. The only agreement or arrangement suggested was on the part of the trustees in bankruptcy, no breach of which could originate or support a claim against the bankrupt. On the facts as alleged no contract on the part of the bankrupt can be implied in fact, and no circumstances are disclosed giving rise to a contract implied in law or quasi contract. It does not appear that the tortfeasor obtained or derived from the petitioners through the commission of the tort any property for the value or proceeds of which it could be held liable under any quasi contractual obligation. It is not like the case of wrongful conversion of property, where there is an election of remedies. The alleged claim is for a tort pure and simple. No election between a remedy *ex delicto* and one *ex contractu* was or is possible. Keener on Quasi Contracts, 159 and 160. The doctrine of "Waiver of tort" can have no application.

While it was the intention of Congress in enacting Section 17 to determine and declare the effect of a discharge in bankruptcy upon demands against the bankrupt provable against his estate, it reasonably may be assumed, in the absence of persuasive evidence to the contrary, that Congress did not intend in and by that section to render so provable, demands not possessing that nature or quality under other provisions of the act.

The third classification in Section 17 has no relevancy to the point under discussion; but the fourth includes debts or claims against the bankrupt "created by his fraud embezzlement, misappropriation, or defalcation, while acting as an officer or in any fiduciary capacity." The fraud here mentioned is restricted to fraud on the part of the bankrupt while acting as an officer or in any fiduciary capacity, and the same statement *mutatis mutandis* is applicable to embezzlement and misappropriation. *Crawford vs. Burke*, 195 U. S. 176, 25 Sup. Ct. 9. 49 L. Ed. 147. The commission of such torts usually involves contractual or quasi-contractual liabilities on the part of the wrongdoer, and whenever such is the case the liability constitutes a "provable" debt or demand founded upon a contract express or implied." The foregoing considerations render unnecessary any interpretations of Section 17 in its original

form, which would impute to Congress an intent in and by that section to establish the provability of demands against the estate of a bankrupt. Indeed, such an interpretation would have produced repugnancy between that section and section 63, and have been calculated to embarrass the Court in the administration of the act. Provability of debts or claims in bankruptcy was not in whole or in part created by the provisions of section 17 as it stood prior to the amendatory act, but was founded solely upon the provisions of section 63. Demands to be provable must have conformed to the requirements of the latter section. In *Crawford vs. Burke* supra, where section 17 before its amendment, was under consideration, the Court through Mr. Justice Brown, said, page 193 of 195 U. S. page 13 of 25 Sup. Ct. (49 L. Ed. 147). 'It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63a.' It is highly improbable that Congress intended by the mere substitution in section 17 of 'liabilities' for 'judgments in actions' to render or recognize as provable all claims for torts, unliquidated as well as liquidated. I am not aware that section 17 has been so construed in any judicial decision. Such an intent on the part of Congress would have been a clear departure from the settled policy of the whole body of bankruptcy legislation in the United States, beginning with the Act of 1800 and ending with that of 1898. It also

60 would have produced glaring repugnancy between section 17 and the limitation by section 63a of provability to the classes of debts there enumerated. Injuries to 'the person or property of another,' it must be conceded, when taken in a broad, unqualified sense, would embrace all torts; and if, 'liabilities' for them were not restricted to such as are provable by virtue of section 63a, the limitation there found largely, if not wholly, would be nullified. Were all torts provable, as well as claims founded upon 'a contract express or implied,' and fixed liabilities 'as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition' etc., it would seem to have been more appropriate had section 63a been framed in conformity with the radically different theory 'taxable costs incurred in good faith by a creditor' etc., and 'costs taxable against an involuntary bankrupt' etc., and all other debts, demands and claims against the bankrupt existing at the time of filing the petition, should be provable against and allowable out of his estates. No construction of section 17 resulting in such repugnancy should be adopted, if it can be avoided without doing violence to the language of the act. In *Lamp Chimney Co. vs. Brass & Copper Company*, 91 U. S. 656, 663, 23 L. Ed. 336, where certain provisions of the bankruptcy act of 1867 were under consideration, the Court through Mr. Justice Clifford used the following language:

"Words and phrases are often found in different provisions of the same statute, which if taken literally, without any qualification would be inconsistent and sometimes repugnant, when by a reasonable interpretation,—as by qualifying both, or restricting one and giving the other a liberal construction,—all become harmonious, and the whole difficulty disappear; and in such a case the rule is, that repug-

nancy should, if practicable, be avoided, and that, if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where a resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the lawmaker.

"But there is nothing in section 17 requiring the application of the above mentioned rule of construction to secure harmony between that section and section 63a. It contains no ambiguous or doubtful words or phrases, nor does its provisions, when naturally and fairly read clash in any particular with those of the other section. Each may have its appropriate and full operation without interfering with the other. While section 17 limits the exception from the operation of a discharge to such of the demands or liabilities it mentions as are 'provable debts,' section 63a limits provability to the classes of demands or liabilities therein defined. Section 17 since the amendment, no more countenances the idea of the provability of a demand or liability, not provable under and by virtue of section 63a, then it did before its amendment."

In affirming the opinion of Judge Bradford, the Circuit Court of Appeals (Brown & Adams vs. United Button Company 149 Fed. 48) argued the ruling of the lower Court, saying in part as follows:

"If any section is controlling in this regard, it is the section which declares what debts are provable, and not the contrary. It is not so much, in other words, that a tort of the character which we have here is discharged by the one, as that it is made provable by the other, that gives it a standing against the estate. Even if the one were true of it and not the other, the right to come in would not be established, it being possible that there is a lapse in the law in this respect, the result of imperfect adjustment, upon amendment; a conclusion to be avoided, if it can be, but not at the expense of that part of the statute which must necessarily govern. * * * Without attempting to amplify or paraphrase the opinion of the learned Judge of that Court (In re United Button Company (D. C.) 140 Fed. 495), it is sufficient in referring to section 17, to again note that the debts which 'a discharge in bankruptcy shall release', are such debts only as are provable under section 63, and the debts which are excepted from discharge, being among others liabilities for certain torts, are also necessarily provable debts."

Again the Circuit Court of Appeals for the Second Circuit In re New York Tunnel Co. 159 Fed. 688, making a like and later ruling against the provability of an unliquidated claim for damages founded upon tort, said:

"In 1903 section 17 was amended in various ways. One change was the substitution of the word 'liabilities' in place of the word 'judgments'. And the provision as it now stands affords some basis for the claim that the exception from the operation of the discharge of particular liabilities for tort implies that such liabilities in general are not discharged. But this implication does not carry far. The amendment was to an exception in the discharge statute which states what debts shall not be discharged rather, than what debts shall be.

A negative provision that liabilities for certain torts shall not be discharged does not, of itself, make all other tort liabilities provable debts. It is apparent that Congress by the amendment intended to preclude the possibility of claims for certain torts discharged, whether reduced to judgment or not. Having that object in view, it used language not wholly in harmony with the other sections of the act. But we see nothing to indicate an intention to enlarge the classes of provable debts. Certainly no intention is evidenced to bring in claims for torts which were never provable under the earlier bankruptcy acts. We therefore follow the very careful opinion of the Circuit Court of Appeals for the Third Circuit in *Brown vs. United Button Co.* 149 Fed. 48, 79 C. C. A. 70, S. L. R. A. (N. S.) 961, in holding that a claim for unliquidated damages founded upon tort is not provable in bankruptcy. The claims of the petitioners were of this nature, unaccompanied with contractual liability and the District Court was without power to make the orders complained of. They should be set aside."

63 See also decision of Judge Grubb, *In re Southern Steel Company* 183 Fed. 498; *Williams vs. U. S. Fidelity & Guaranty Company* 236 U. S. 553.

In addition to the abundance of judicial authority, which has been considered in the foregoing decisions, all of the text writers on bankruptcy may be said to be in accord with the trustee's rights herein urged. "Collier on Bankruptcy" (9th Ed.) foot note, qualifying his expressions made in the body of his text on the same page 853; "Remington on Bankruptcy" (3rd Ed.) p. 915; "Loveland on Bankruptcy" (4th Ed.) p. 668; "Black on Bankruptcy" (1914 Ed.) Sec. 514, pp. 1107-1109.

Mr. Woodman in his treatise on "The Law of Trustees in Bankruptcy" under Section 445 "Unliquidated Claims" pp. 690-692 refers to the contentions frequently made that Sec. 63 of the present bankruptcy law has been amplified by paragraph "b" of the same section and also by section 17 as amended. Discussing these contentions in the light of the Supreme Court decisions, above referred to, he then says:

"It seems clear therefore that only such unliquidated claims are provable as arise upon contracts, express or implied which are within the terms of Sec. 63a. In Sec. 63a there is a complete enumeration of the classes of debts which are provable in bankruptcy, and it has been held that it is untenable to assume that the list is enlarged by the wording of Sec. 7 which makes provision as to what debts are not affected by a discharge of the bankrupt; nevertheless it is undoubtedly true that in order to have a full understanding of Sec. 63a, that section must be read in connection with Sec. 17, * * *. Again on page 698 it is said: "Sec. 449—"Claims for unliquidated damages arising ex delicto. A claim for damages arising ex delicto is not provable unless it is of such a nature that the claimant can waive the tort and rely upon a contractual or quasi-contractual liability of the bankrupt."

This rule of law as plainly stated in the above quotation has been

64 recognized in every bankruptcy act of this country, is uniformly indorsed by the recognized text writers and has been elaborately and forcibly maintained by ablest judicial authority.

A voluntary proceeding in bankruptcy cannot be imagined without the existence of "debts," demands or claims provable in bankruptcy (Sec. 1-subdiv. 11), for if the bankrupt had naught but non-provable debts then bankruptcy, at least as to him, would be an idle proceeding, the goal of relief sought by him being quite beyond his reach, for only provable debts are dischargeable (Sec. 17). It is also true than an involuntary bankruptcy proceeding cannot be imagined without debts demands or claims provable in bankruptcy, because only creditors or their authorized agents owning provable claims can prosecute such a proceeding. (Sec. 1 subdiv. 9 and Sec. 59 paragraph "b"). It is likewise true that a bankruptcy proceeding, voluntary or involuntary, is but a proceeding in tem against all non-exempt property of the bankrupt, the division of whose assets can only be effected among such debts, demands or claims as are provable and allowable (Sec. 65). It is thus apparent that the word "provable" gives life and comprehensiveness to every part of this remedial, equitable statute, which provides for the inauguration, administration and consummation of a proceeding in bankruptcy. It is therefore possible of belief that Congress could have been so indifferent or unwise in defining this class of provable debts, demands or claims in bankruptcy, Sec. 63a, as to have inadvertently omitted from this section such a class of debts, demands or claims as are here attacked by the trustees? Is it also possible of belief that upon the three occasions when Congress has deemed it imperative to amend the bankruptcy act (existing for nearly eighteen years) by as many as thirty-two qualifications or addenda, that it could have been so indifferent or unwise in defining this class of provable debts, before us, participation in the assets of a bankruptcy estate? The conclusion is inevitable that Congress intended by its original and careful enumeration of "Debts which may be proved" under 65 Sec. 63a, to confine provable debts to those debts therein specified. Otherwise this conclusion which has been forcibly adopted in the "United States Button Company" case, decided over ten years ago, and only three years after the amendment of 1903 to Sec. 17, would have been speedily rejected by the higher Courts as illogical, judicial legislation or would surely have been overcome by subsequent amendments in 1906 or 1910.

Assuming however for argument sake that the 1903 amendment to Sec. 17, has enlarged the scope of provable claims under Sec. 63, paragraphs "a" and "b", the equally important question arises as to the allowability of these claims against the individual estates of Le More and of Carriere as well as against the partnership estate of A. Le More & Company. Sec. 5 of the bankruptcy act of 1898, has remained as originally enacted, and reads in part as follows:

"f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individ-

ual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"g. The Court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

The language of the above paragraph is simple, direct and not capable of doubtful interpretation. The final clause of paragraph "g" sounds the key note to every bankruptcy administration, of which one of its two cardinal purposes is the equitable distribution of the property of the several estates. Counsel for claimants contend, and cite "Lindley on Partnership" (5th Ed. p. 703) to show that:

"Breaches of trust and frauds imputable to a firm place the cestuis que trustent in the position of joint and several creditors."

There is no criticism to be made of this academic postulate as above stated, in fact, it must be conceded that in Louisiana, if the laws of that State be considered as determining claimant's rights before this Court, that the individual partners of A. Le More & Company, whose firm was the sole maker of the accepted partnership drafts, would themselves be contractually liable in solido upon the partnership obligation, (Rev. Civil Code La. Arts. 2872-2875). In this case before us it must be observed, as already stated, that neither of the partners were individual makers or indorsers as such upon the accepted drafts of the partnership, nor have complainants, by any facts herein, been shown to have looked to, nor relied upon either of these partners, or their individual properties for guaranty of these drafts. It would be a grossly inequitable and no less a violation of Sec. 5 of the bankruptcy act, to allow partnership claims ex delicto to participate in the individual estates, as it would be to allow partnership claims ex contractu the same privilege.

Black on Bankruptcy p. 309 and 310, discusses the rule of payment as follows:

"Notwithstanding some differences of opinion, the decided weight of authority is to the effect that a note made jointly by all members of a firm, strictly in the course of the partnership business, and for a consideration passing to the firm, is to be treated as the debt of the firm, though not signed in the firm name, and not as the debt of the individual partners. And so where property has been wrongfully converted by a partnership and injured to the benefit of the firm, and the owner, waiving the tort, seeks to recover the value of the property as on an implied contract, his claim is against the firm and not against any individual partner, but there must be something to show that the debt in question is properly

chargeable to the firm rather than to the partners jointly, or that the firm had the benefit of the transaction out of which it arose."

Counsel for claimants stress the commentary of this same text-writer (pages 314 and 315) but the principle there annunciated is based upon cited decisions whose facts are wholly different from the facts now under consideration, those cases showing the partners to have been held individually liable because of their individual making or indorsing of the partnership obligation, and that they as individuals were unjustly enriched. Among these cases appears in *re Coe* (169 Fed. 1002, affirmed 183 Fed. 745). This and similar cases are cited by claimants as substantial authority for their right to double proof, but Mr. Black in the foot note above referred to, says:

"These decisions were disapproved in a later case in which it was held that the rule which permits the owner of property converted to waive the tort and to recover the value of the property as on an implied contract, is based on the ground that defendants' estate has been unjustly enriched by the conversion, and where it was by a partnership, and inured to the benefit of the firm's estate, whatever implied contract arises is that of the firm, and not of an individual partner, and the owner of the property after having proved his claim against the partnership estate, is not entitled to prove it against the individual estate of a partner, which would have the effect of giving them an advantage over creditors having express contracts with the firm."

See also *Collier on Bankruptcy* (9th Ed. p. 176).

68 The case to which Mr. Black refers in the above foot note is that of *Reynolds vs. New York Trust Co.*, (188 Fed. 611). This is a case in which there was a fraudulent conversion by one member of the firm, to the firm's benefit, of certain bonds. The ruling in this case is of peculiar weight and should be given particular attention because of the double light which it sheds upon the two points involved in the present case and because of its great similarity of facts to the case before us. In denying the attempted double proof against the partners as well as the firm's estate the Court said, at page 619:

"The bankruptcy act requires a distinction between firm and individual debts. The test of whether the debt is firm or individual is the character of the transaction from which it arises. Here there was no transaction other than a firm transaction; and a fiction of law which raises a promise based solely upon tort liability and not upon an obligation to pay for value received by an individual, cannot be allowed without an infringement of the rights of the individual creditors, and of bankruptcy rules of equality."

The Supreme Court of the United States in the recent decision, *Farmers and Mechanics National Bank of Philadelphia vs. Ridge Avenue Bank*, (240 U. S. 498), "has definitely and for the second time pronounced in favor of the mandatory provisions of Sec. 5 paragraphs "f" and "g" of the bankruptcy act. In the earlier case of *Miller vs. New Orleans Fertilizer Company* (211 U. S. 496), as in the above recent opinion, Mr. Chief Justice White was the organ

of the Court. In rendering the later decision (April 3rd, 1916) and after reviewing conflicting authorities in regard to the construction of paragraphs "f" of Sec. 5 of the act, the Court answered in the affirmative the question whether double proof, as in this case, should be denied. The opinion of the Court is here quoted in part as follows: (see advanced sheet 240 U. S. Rep. page 509).

69 "In fact irrespective of the considerations derived from the origin of such assumed exception to which we have referred, when the positive commands of the statute are considered and the new power conferred by the act as to partnership estates is borne in mind, we see no escape from the conclusion that the powers conferred by subsection sub. *g* are coincident with the duties which the act imposes and amply efficient to secure and give effect to their performances. This indeed, was the view hitherto indicated in *Miller vs. New Orleans Fertilizer Co.*, 211 U. S. 496, where after quoting subsection *f* of the act it was said "To enforce these provisions the act compels (Subdv. *d*) the keeping of separate accounts of the partnership property and of the property belonging to the individual partners; the payment (subdv. *e*) of the bankrupt expenses as to the partnership and as to the individual property proportionately; and permits (subdiv. *g*) the proof of the claim of the partnership estate against the individual estate, and vice versa, and directs the marshaling of the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. "p. 504.

It follows that the question propounded will be answered, yes."

For reasons herein set forth, it appearing to the Referee that the law and the evidence are in favor of Petitioners, Frederic Camors, Nicholas Riviere and R. M. Walmsley, Trustees of the Bankruptcy estates of Albert Le More, bankrupt, and of Ed. E. Carriere bankrupt, and against Muller, Schall and Company, claimants, and defendants herein.

It is ordered that the claims of Muller Schall and Company, which have been heretofore filed herein, against the individual bankruptcy estates of Albert Le More and of Ed. E. Carriere, be and they hereby are expunged and disallowed and the rights of said claimants to participate in any dividends allowed or to be allowed in said bankruptcy estates are hereby denied.

70 It is further ordered that the costs of these proceedings be taxed against Muller Schall & Company.

Judgment rendered May 20th, 1916.

Judgment signed May 25th, 1916.

(Sig.)

WM. A. BELL, *Referee.*

Motion of Muller, Schall & Co., and Order of Referee thereon Extending Time to Apply for Review.

Filed Before Referee May 31, 1916, at 10 A. M. Filed in Court August 14, 1916, at 11:45 A. M.

In the United States District Court for the Eastern District of Louisiana.

No. —.

In Re Bankruptcy of A. LE MORE & COMPANY and The Individual Members of the Said Firm.

On motion of Howe, Fenner, Spencer & Cocke, and Rounds, Hatch, Dillingham & Debevois, attorneys for Muller-Schall & Company, and on suggesting that owing to the fact that the leading counsel for Muller-Schall & Company resides in the City of New York, movers desire an additional delay within which to file a petition for review of the judgment of the Referee upon the petition of the Trustees to expunge the proofs of claim of Muller-Schall & Company against the individual estates of the bankrupts herein;

It is ordered by the Referee that the said Muller-Schall & Company be, and they are hereby granted an additional delay of Ten days within which to file the said petition for review.

May 31, 1917.

(Signed)

WM. A. BEIL, Referee.

71 *Motion of Muller, Schall & Co., and Order of Referee thereon, Granting It a Further Delay to File Petition for Review.*

Filed before Referee June 8, 1916, at 10 A. M., filed in Court August 14, 1916, at 11:45 A. M.

In the United States District Court for the Eastern District of Louisiana.

No. 1880.

In Re Bankruptcy of A. LE MORE & COMPANY and the Individual Members of Said Firm.

On motion of Howe, Fenner, Spencer & Cocke, and Rounds, Hatch, Dillingham & Debevoise, Attorneys for Muller, Schall & Company, and on suggesting that owing to the fact that the leading counsel for Muller-Schall & Company resides in the City of New York, and that Charles Payne Fenner, Esquire, local counsel, who has immediate charge of this matter, is absent from the State of Louisiana, movers desire a further delay within which to file a petition for review of

the judgment of the Referee upon the petition of the Trustees to expunge the proofs of claim of Muller-Schall & Company against the individual estates of the bankrupts herein;

It is ordered by the Referee that the said Muller-Schall & Company be, and they are hereby granted, a further delay until June 24, 1916, within which to file the said petition for review.

(Signed)

PHILIP GENSLER, JR.,
Referee.

June 8th, 1916.

72 *Petition of Muller, Schall & Co. for Review of Referee's Judgment on Rule to Expunge Its Claims Against the Individual Estates of Albert Le More and Ed. E. Carriere and Order of Referee Granting Same.*

Filed before Referee June 17, 1916, at 10 A. M., filed in Court August 14, 1916, at 11:45 A. M.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

In the Matter of ALBERT LE MORE and EDWARD E. CARRIERE, Individually and as Copartners Conducting Business under the Firm Names of A. Le More & Company and Ed. E. Carriere & Company, Bankrupts.

To the Honorable William A. Bell, Referee in Bankruptcy:

Your petitioners, William Schall, Jr., Carl Muller, Edmund Pav-enstedt and Frederick Muller-Schall, Jr., copartners composing the firm of Muller, Schall & Company, respectfully show as follows on information and belief;

That on or about the 8th day of May, 1915, your petitioners filed proofs of debt against the individual estate of Albert Le More, bankrupt, and against the individual estate of Edward E. Carriere, bankrupt, respectively, each for the sum of \$70,050, with Hon. William A. Bell, as Referee herein; that the said Referee duly allowed each of said claims; that thereafter Frederick Camors, Nichols Riviere and R. M. Walmsley, as Trustees of the said individual estates, filed a petition with objections on July 15th, 1915, praying that the allowance of said claims be reconsidered and disallowed and that thereupon said Referee by an order to show cause dated July 15th,

1915, ordered your petitioners to show cause before him why
73 said petition should not be granted and the claim of your petitioners reconsidered and disallowed; and hearings upon said petition and order to show cause were had before said Referee and evidence submitted and arguments made by said trustees and your petitioners; that thereupon your petitioners moved that said petition and motion of the trustees be denied and that the Referee should order that said claims of your petitioners were valid, provable claims against said individual estates and should not be reconsidered,

disallowed or expunged and that no costs, fees or expenses should be charged against your petitioners; that nevertheless the Referee erroneously, as your petitioners respectfully submit, denied their said motion and made and entered an order herein, dated May 25, 1916, upon said petition, order to show cause and all the evidence and exhibits upon said hearings, ordering that said claims of your petitioners be reconsidered and disallowed as claims against the individual estates of Albert Le More and Edward E. Carriere and directing that the trustees expunge the same from the list of creditors of said individual estates upon his record, and that the costs of the hearings upon said claims to the amount of \$— be paid by your petitioners.

The errors complained of are those above stated and also the following:

1. The Referee erred in failing to find that your petitioners' above named claims having been proved and allowed, were presumptively valid and that said presumption was not overcome by the evidence.

2. The Referee erred in failing to find that the claim filed against the individual estate of Albert Le More was a valid and provable claim against his individual estate and was properly proved and allowed against that estate.

3. The Referee erred in failing to find that the proof of claim filed against the individual estate of Edward E. Carriere was a
74 valid and provable claim against his estate and was properly proved and allowed against that estate.

4. The Referee erred in failing to find that all the facts stated in your petitioners' said proof of claim against the individual estate of Albert Le More were true and that upon said facts said Albert Le More was and his individual estate in bankruptcy now is severally liable and indebted to your petitioner for the amount of \$70,050, and that said claim was a valid and provable claim against said individual estate.

5. The Referee erred in failing to find that all the facts stated in your petitioners' said proof of claim against the individual estate of Edward E. Carriere were true and that upon said facts said Edward E. Carriere was and his individual estate in bankruptcy now is severally liable and indebted to your petitioners for the amount of \$70,050, and that said claim was a valid and provable claim against said individual estate.

6. The Referee erred in failing to find that the quasi contractual liability of Albert Le More to repay the moneys of your petitioners obtained from them by fraud was several as against the partner Albert Le More and that said rule of several liability applies to the facts of this case.

7. The Referee erred in failing to find that the quasi contractual liability of Edward E. Carriere to repay the moneys of your petitioners obtained from them by fraud was several as against the partner Edward E. Carriere and that said rule of several liability applies to the facts of this case.

8. The Referee erred in failing to find that the indebtedness of A. Le More & Company to your petitioners upon the drafts and checks mentioned in the respective proofs of debt was wholly distinct and separate from the liability of Albert Le More and his individual estate arising from the fraudulent representations
75 made upon the sale of said drafts and checks to your petitioners and wholly separate and distinct from your petitioners' claim proved against the individual estate of Albert Le More as above stated, and that the liability of the said firm upon said checks and drafts was not inconsistent with said liability of said Albert Le More and his individual estate.

9. The Referee erred in failing to find that the indebtedness of A. Le More & Company to your petitioners upon the drafts and checks mentioned in the respective proofs of debt was wholly distinct and separate from the liability of Edward E. Carriere and his individual estate arising from the fraudulent representations made upon the sale of said drafts and checks to your petitioners and wholly separate and distinct from your petitioners' claim proved against the individual estate of Edward E. Carriere as above set forth, and that the liability of the said firm upon said checks and drafts was not inconsistent with said liability of said Edward E. Carriere and his individual estate.

10. The Referee erred in failing to find that the claim against the individual estate of Albert Le More was provable as a claim in tort for fraud.

11. The Referee erred in failing to find that the claim against the individual estate of Edward E. Carriere was provable as a claim in tort for fraud.

12. The Referee erred in finding that the transactions on which the claims against the separate estates of Albert Le More and Edward E. Carriere are based took place in New York and were hand-ed entirely through the partnership agent there.

13. The Referee erred *if* [in] failing to find that the claim against the individual estate of Albert Le More was provable as a claim upon an implied or quasi contract.

76 14. The Referee erred in failing to find that the claim against the individual estate of Edward E. Carriere was provable as a claim upon an implied or quasi-contract.

15. The Referee erred in holding that the separate proofs of claim could not be filed against the firm and against the individual estates of Albert Le More and Edward E. Carriere.

16. The Referee erred in failing to find that no costs, fees or expenses are legally chargeable against the claimants and those directed by said order of May 25, 1916, to be paid by your petitioners should not have been charged to them and in directing that the same be paid by your petitioners.

17. The Referee erred in ordering that said claims should be reconsidered, disallowed and expunged and directing that your petitioners pay certain expenses and that your petitioners except to said order and every part thereof.

Your petitioners desire a review of said order by the Judge of the

United States District Court for the Eastern District of Louisiana,
New Orleans Division.

Your petitioners therefore pray that said order and every part thereof may be reviewed according to law upon said proofs of debt, petition, order to show cause and all the evidence and exhibits submitted at said hearings and that with a certificate of the questions presented and his summary of the evidence relating thereto and his finding and order thereon, the Referee shall certify to said Judge said proofs of debt filed by your petitioners with the Referee on or about May 8, 1915, said petition of said trustees filed July 15th, 1915, said order to show cause upon said petition dated July 15th, 1915, the complete stenographic minutes of said hearings had, proceedings taken and testimony and exhibits submitted by
77 the various parties upon or under said order to show cause, the opinion or decision of the Referee dated May 20th, 1916, and said order made and entered by the Referee on May 25, 1916, and for such other and further relief as to the Court may seem just.

MULLER, SCHALL & COMPANY,
By CHARLES PAYNE FENNER,

Attorney.

UNITED STATES OF AMERICA,
Eastern District of Louisiana,
New Orleans Division, ss:

Charles P. Fenner, being duly sworn, says: That he is attorney and counsel for Muller, Schall & Company, the petitioners above named; that he has read the foregoing petition and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that the reasons why this verification is made by deponent and not by said petitioners is that the said petitioners do not reside within the Eastern District of Louisiana and have no office or place of business within said District and are none of them presently in the district; that the grounds of deponent's belief as to all matters not in said petition stated to be upon his knowledge are papers in deponent's possession and statements made by persons familiar with the facts.

(Signed)

CHARLES PAYNE FENNER.

Sworn to before me this 17th day of June, 1916.

(Signed)

PIERRE D. OLIVIER,

[SEAL.]

Notary Public.

Order.

The petition for Review is hereby granted as prayed for and according to law.

(Signed)

PHILIP GENSLER, JR.,

Referee.

New Orleans, La., June 17, 1916.

78 *Referee's Certificate on Petition for Review.*

Filed August 14, 1916, at 11:45 A. M.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

No. 1880. In Bankruptcy.

In the Matter of A. LE MORE & Co. and Ed. E. CARRIERE & Co. and Albert Le More and Ed. E. Carriere, Individually, Bankrupts.

To the Honorable Rufus E. Foster, U. S. District Judge:

I, William A. Bell, Referee in Bankruptcy, do hereby certify:

That on July 15th, 1915, the Trustees of the above estate filed a petition to expunge the claims of Muller, Schall & Company, which said Company filed against the individual Estates of Albert Le More and Ed. E. Carriere, on the ground that said claims were provable only against the partnership estate and not against the Individual Estates;

That at the hearing hereof the Canal-Louisiana Bank & Trust Company, through its Liquidators and Counsel, applied for permission to intervene and join the Trustees in expunging the claims of said Muller, Schall & Co., to which application Counsel for Muller, Schall and Company objected, upon the ground that no individual creditor was entitled to be entered of record in the said proceeding, or to participate therein as a party thereto.

Subsequently, Counsel for Canal-Louisiana Bank & Trust Co. filed a petition praying for correction of the Stenographer's report, to read that Counsel appeared for "Canal Louisiana Bank & Trust Co., and not for "Canal Bank & Trust Co.," and an order was entered accordingly by the Referee;

That on May 20th, 1916, judgment was entered by the Referee, expunging and disallowing the claims of Muller, Schall & Co., as against the Individual Estates of Albert Le More and Ed. E.

79 Carriere, Bankrupts, which judgment was signed May 25th, 1916, and on the said respective dates, judgment was also entered and signed denying to the Canal Louisiana Bank & Trust Company the right to intervene or join in the Trustees' proceedings to expunge the claims of Muller, Schall & Co., as herein taken;

That the Canal Louisiana Bank & Trust Company and Muller Schall & Company each feeling aggrieved at the aforesaid judgments, have each applied for and obtained orders granting reviews of the aforesaid Referee's judgments.

I hand up herewith for the information of the Court the following documents:

Ref. No.

1st. Proofs of claims of Muller, Schall & Company.

(a) Claim against Partnership of A. Le More & Co., and Ed. E. Carriere & Co.....	118
(b) Claim against Individual Estate of Albert Le More	10
(c) Claim against Individual Estate of Ed. E. Car- riere	6

2nd. Petition of Trustees to pay Muller, Schall & Co., 3% dividend on claim against partnership of A. Le More & Co., and Ed. E. Carriere & Company.....	145
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4th. Testimony taken on the Trustee's rule against Muller, Schall and Company	198
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5th. Stipulation, etc., on rule to Canal-La. Bank & Trust Co. against Trustees	185
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7th. Petition of Canal Louisiana Bank & Trust Company praying for correction of Stenographer's report.....	184
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9th. Referee's judgment on petition of Trustees to expunge claims of Muller, Schall & Co., against the Individual Estates of Albert Le More and Ed. E. Carriere.....	221
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10th. Petition of Canal Louisiana Bank & Trust Company to review Referee's judgment denying them the right to intervene and join the Trustees in expunging the claims of Muller, Schall & Company, and order thereon.....	223
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11th. Two motions and orders thereon of Muller, Schall & Co., for extension of time to file petition for review of Referee's judgment expunging and disallowing their claims, (a) filed May 31st, 1916, (b) filed June 8th, 1916	226-229
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12th. Petition of Muller, Schall & Company for review of Referee's judgment on Trustees' rule to expunge their claims against the individual Estates of Albert Le More and Ed E. Carriere, and order thereon.....	232
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New Orleans, La., August 14th, 1916.

Respectfully submitted,

(Signed)

WM. A. BELL, *Referee*

81 *Opinion of the Court on Appeal of Muller, Schall & Co. et al.*

Filed September 4, 1917.

United States District Court, Eastern District of Louisiana.

No. 1880. In Bankruptcy.

In the Matter of A. LE MORE & COMPANY et als., Bankrupts.

On Appeal of Muller, Schall & Company.

In this matter the opinion of the referee is exhaustive and conclusive.

His judgment is right and will be affirmed.

On Appeal of Canal Bank & Trust Company.

Considering the vigorous action of the trustee on behalf of all the creditors, appellant has no standing to petition for the expunging of appellee's claim.

The judgment of the referee will be affirmed.

Decree Affirming Order of Referee In re Appeal of Muller, Schall & Co.

Filed September 6, 1917.

United States District Court, Eastern District of Louisiana.

No. 1880.

In the Matter of A. LE MORE & COMPANY et als., Bankrupts.

This cause came on to be heard at a former day upon the petition of Muller, Schall & Company for a review of the Order of
82 Hon. Wm. A. Bell. Referee, rendered on May 20th, 1916, and signed on May 25th, 1916, expunging and disallowing the claims of said Muller, Schall & Company against the individual estates of Albert Le More and of Ed. E. Carriere, and denying the rights of said claimants to participate in any dividends allowed or to be allowed in said bankruptcy estates, and was argued by counsel for the respective parties and submitted, when the Court took time to consider;

Whereupon, and on due consideration thereof, and for the written reasons of the Court on file,

It is ordered, adjudged and decreed by the Court that the said petition of Muller, Schall & Company for a review herein be, and the same is hereby, dismissed, and that the said order of the referee, ap-

pealed from herein, be, and the same is hereby in all respects, affirmed.

(Signed) RUFUS E. FOSTER, *Judge.*

New Orleans, La., September 6, 1917.

Petition for Appeal.

Filed September 13, 1917.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

In the Matter of ALBERT LE MORE and EDWARD E. CARRIERE, Individually and as Copartners, Conducting Business under the Firm Names of A. Le More & Company and Ed. E. Carriere & Company, Bankrupts.

William Schall, Jr., Carl Muller, Edmund Pavenstedt and Frederick Muller Schall conceiving themselves aggrieved by the order entered in the office of the Clerk of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, on the 6th day of September, 1917, in the above proceeding, denying their petition for the review of the order of the Referee dated May 15th, 1916, expunging and disallowing their claims against the individual bankruptcy estates of Albert Le More and Edward E. Carriere and denying the rights of said claimants to participate in any dividends allowed or to be allowed in said bankruptcy estates, said claims so disallowed being in excess of Seventy thousand (70,000) dollars, do hereby petition for an appeal from the said order to the United States Circuit Court of Appeals for the Fifth Circuit, and pray that their appeal may be allowed and a citation granted, directed to Frederic Camors, Nicholas Riviere and R. M. Walmsley, Trustees of the Bankrupt Estates of Albert Le More, bankrupt and of Edward E. Carriere, bankrupt, commanding them and each of them to appear before the United States Circuit Court of Appeals for the Fifth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit.

Dated, September 13, 1917.

(Signed) HOWE, FENNER, SPENCER & COCKE,

(Signed) ROUNDS, HATCH, DILLINGHAM & DEBEVOISE,

Attorneys for Muller, Schall & Company, Claimants.

The foregoing appeal is hereby allowed, upon petitioners furnishing bond in the sum of \$250.00, conditioned as the law directs.

Dated September 13, 1917.

(Signed) RUFUS E. FOSTER, *Judge.*

Assignment of Errors.

Filed September 13, 1917.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

In the Matter of ALBERT LE MORE and EDWARD E. CARRIERE, Individually and as Copartners, Conducting Business under the Firm Names of A. Le More & Company and Ed. E. Carriere & Company, Bankrupts.

Now come William Schall, Jr., Carl Muller, Edmund Pavenstedt and Frederick Muller Schall and file the following assignments of errors:

I. That the United States District Court for the Eastern District of Louisiana, New Orleans Division, erred in affirming the order of the Referee, dated May 25th, 1916, expunging and disallowing their claims against the individual estates of Albert Le More and Edward E. Carriere and denying the right of said claimants to participate in any dividends allowed or to be allowed in said bankruptcy estates.

II. The Court erred in failing to find that said claims above named having been proved and allowed, were presumptively valid and that said presumption was not overcome by the evidence.

III. The Court erred in failing to find that the claim filed against the individual estate of Albert Le More was a valid and provable claim against his individual estate and was properly proved and allowed against that estate.

IV. The Court erred in failing to find that the proof of claim filed against the individual estate of Edward E. Carriere was a valid and provable claim against his estate and was properly proved and allowed against the estate.

85 V. The Court erred in failing to find that all the facts stated in said proof of claim against the individual estate of Albert Le More were true and that upon said facts said Albert Le More was and his individual estate in bankruptcy now is severally liable to the claimants for the amount of Seventy thousand and fifty and 00/100 (70,050.00) Dollars, and that said claim was a valid and provable claim against said individual estate.

VI. The Court erred in failing to find that all the facts stated in said proof of claim against the individual estate of Edward E. Carriere were true and that upon said facts said Edward E. Carriere was and his individual estate in bankruptcy now is severally liable and indebted to the claimants for the amount of Seventy thousand and fifty and 00/100 (70,050.00) Dollars and that said claim was a valid and provable claim against said individual estate.

VII. The Court erred in failing to find that the quasi contractual liability of Albert Le More to repay the moneys of the claimants obtained from them by fraud was several as against the partner

Albert Le More and that said rule of several liability applies to the facts of this case.

VIII. The Court erred in failing to find that the quasi contractual liability of Edward E. Carriere to repay the moneys of the claimants obtained from them by fraud was several as against the partner Edward E. Carriere and that said rule of several liability applies to the facts of this case.

IX. The Court erred in failing to find that the indebtedness of A. Le More & Company to the claimants upon the drafts and checks mentioned in the respective proofs of debt was wholly distinct and separate from the liability of Albert Le More and his individual estate arising from the fraudulent representations made upon the sale of said drafts and checks to the claimants and wholly
86 separate and distinct from the claimants' claim proved against the individual estate of Albert Le More as above stated, and that the liability of the said firm upon said checks and drafts was not inconsistent with said liability of Albert Le More and his individual estate.

X. The Court erred in failing to find that the indebtedness of A. Le More & Company to the claimants upon the drafts and checks mentioned in the respective proofs of debt was wholly distinct and separate from the liability of Edward E. Carriere and his individual estate arising from the fraudulent representations made upon the sale of said drafts and checks to the claimants and wholly separate and distinct from the claim proved by the claimants against the individual estate of Edward E. Carriere as above set forth, and that the liability of the said firm upon said checks and drafts was not inconsistent with said liability of said Edward E. Carriere and his individual estate.

XI. The Court erred in failing to find that the claim against the individual estate of Albert Le More was provable as a claim in tort for fraud.

XII. The Court erred in failing to find that the claim against the individual estate of Edward E. Carriere was provable as a claim in tort for fraud.

XIII. The Court erred in finding that the transactions on which the claims against the separate estates of Albert Le More and Edward E. Carriere are based took place in New York and were handled entirely through the partnership agent there.

XIV. The Court erred in failing to find that the claim against the individual estate of Albert Le More was provable as a claim upon an implied or quasi contract.

XV. The Court erred in failing to find that the claim against the individual estate of Edward E. Carriere was provable as a claim upon an implied or quasi contract.

87 XVI. The Court erred in holding that separate proofs of claim could not be filed against the firm and against the individual estate of Albert Le More and Edward E. Carriere.

XVII. The Court erred in failing to find that the claimants are entitled to participate in any dividends allowed or to be allowed out

of the individual bankrupt estates of Albert Le More and Edward E. Carriere.

XVIII. The Court erred in making the order dated September 6, 1917, denying the claimant's petition to review the order of the Referee.

(Signed)

ROUNDS, HATCH, DILLINGHAM &
DEBEVOISE,

(Signed)

HOWE, FENNER, SPENCER &
COCKE,

*Attorneys for Muller, Schall &
Company, Claimants.*

Bond of Appeal.

Filed September 13, 1917.

District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

In the Matter of ALBERT LE MORE and EDWARD E. CARRIERE, Individually and as Copartners, Conducting Business under the Firm-names of A. Le More & Company and Ed. E. Carriere & Company, Bankrupts.

Know all men by these presents, that we, William Schall, Carl Muller, Edmund Pavenstedt and Frederick Muller Schall, as principals, and the United States Fidelity & Guaranty Company having an office and usual place of business at Whitney Central Building, New Orleans, Louisiana, as surety, are held and firmly bound unto Frederic Camors, Nicholas Riviere and R. M. Walmsley, Trustees of the bankrupt estates of Albert Lemore, bankrupt and of Edward E. Carriere, bankrupt, in the sum of Two hundred and fifty dollars (250.00), to be paid to the said Frederic Camors, Nicholas Riviere and R. M. Walmsley, for the payment of which well and truly to be made, we bind ourselves, our, and each of our, heirs, representatives, successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of September, 1917.

Whereas the above named William Schall, Carl Muller, Edmund Pavenstedt and Frederick Muller Schall have prosecuted their appeal to the United States Circuit — of Appeals for the Fifth Circuit to reverse the order dated the 6th day of September, 1917, rendered in the above entitled bankruptcy proceeding in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

Now therefore, the condition of this obligation is such that if the above named William Schall, Carl Muller, Edmund Pavenstedt and Frederick Muller Schall shall prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good,

then this obligation shall be void, otherwise the same to be and remain in full force and virtue.

(Signed) WILLIAM SCHALL, [L. s.]

" By C. MULLER, *Atty.* [L. s.]

" C. MULLER. [L. s.]

" EDMUND PAVENSTEDT, [L. s.]

" By C. MULLER, *Atty.* [L. s.]

(Signed) F. MULLER SCHALL. [L. s.]

UNITED STATES FIDELITY &

GUARANTY CO.,

[SEAL.] By J. E. BUCK, *Atty. in Fact.*

Approved:

(Signed) RUFUS E. FOSTER, *Judge.*

89 *Præcipe for Transcript on Appeal Taken by Muller, Schall & Co.*

Filed September 20, 1917, at 4:15 P. M.

(On Letter Head of Howe, Fenner, Spencer & Cocke.)

September 20, 1917.

H. J. Carter, Esq., Clerk United States District Court, Eastern District of Louisiana, New Orleans, Louisiana.

DEAR SIR: In making up the transcript in connection with the appeal taken by Muller, Schall & Company in the matter of A. Le More & Company and E. E. Carriere & Company, and Albert Le More and Edward E. Carriere, Individually, Bankrupts, No. 1880 in Bankruptcy, you will please include the following:

(1) Proofs of claims of Muller, Schall & Company;
(a) Claim against the partnership of A. Le More & Company and E. E. Carriere & Company;

(b) Claim against individual estate of Albert Le More.

(c) Claim against individual estate of Edward E. Carriere.

(2) Petition of Trustees to pay Muller, Schall & Company three per cent dividend on claim against partnership of A. Le More & Company and E. E. Carriere & Company.

(3) Trustees' petition and show cause order to expunge the claims of Muller, Schall & Company.

(4) Testimony taken on the Trustees' rule against Muller, Schall & Company.

90 (5) Trustees' exhibits offered in evidence at the hearing of said rule.

(6) Referee's judgment on petition of Trustees to expunge claims of Muller, Schall & Company against the individual estates of Albert Le More and Edward E. Carriere.

(7) Two motions and orders thereon of Muller, Schall & Company, for extension of time to file petition for review of Referee's judgment expunging and disallowing their claims;

- (a) Filed May 31st, 1916;
 - (b) Filed June 8th, 1916;
 - (8) Petition of Muller, Schall & Company for review of Referee's judgment on 'Trustees' rule to expunge their claims against the individual estates of Albert Le More and Edward E. Carriere, and order thereon.
 - (9) Certificate of Referee to the Court certifying the proceedings for review by the Court.
 - (10) Decree of District Court affirming the report of Referee and rejecting petition for review of Muller, Schall & Company.
 - (11) Opinion of the Court.
 - (12) Petition of Muller, Schall & Company for appeal and order allowing same.
 - (13) Bond of appeal given by Muller, Schall & Company.
 - (14) Assignment of errors filed by Muller, Schall & Company.
 - (15) Citation of appeal with the acceptance of service thereon by attorneys for the Trustees of the bankrupt estates.
- Yours very truly,
- (Sig.) HOWE, FENNER, SPENCER & COCKE,
Attys. for Muller, Schall & Company.

P./S.

Letter from Attorneys for Trustees as to the Sufficiency of the Documents Included in the Præcipe for Transcript.

Filed October 2, 1917.

(On Letter Head of Hall, Monroe & Lemann, Attorneys at Law,
 New Orleans, La.)

October 1, 1917.

Hon. H. J. Carter, Clerk United States District Court, City.

DEAR SIR: At the request of Messrs. Howe, Fenner, Spencer & Cocke, we write to say that in our judgment it will be sufficient for you to include the documents described by them in their letter to you of September 20, 1917, in making up the transcript in connection with the appeal taken by Muller, Schall & Company in the matter of A. Le More & Company and Ed. E. Carriere & Company, and Albert Le More and Ed. E. Carriere, individually, bankrupts, No. 1880, in Bankruptcy.

Yours very truly,
 (Sig.)

HALL, MONROE & LEMANN.

M. M. L./G.

92 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana,
New Orleans Division.

Clerk's Office.

I, H. J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 95 pages contain and form a full, complete, true and perfect transcript of the record, assignment of errors and proceedings in the case of "Guaranty Trust Company of New York et als. versus Albert Le More and Edward E. Carriere, Individually, and as Copartners conducting business under the Firm Names of A. Le More & Co. and Edward E. Carriere & Co., Bankrupts," No. 1880 of the Bankruptcy Docket of the United States District Court for the Eastern District of Louisiana, New Orleans Division, on the rule taken by the Trustees to expunge the claims of Muller, Schall & Company against the individual estates of Albert Le More and Edward E. Carriere (as made in accordance with the Præcipe for Transcript copied therein).

Witness my hand, and the seal of the said Court, at the City of New Orleans, La., on this 8 day of October, A. D. 1917.

[SEAL.]

H. J. CARTER, *Clerk*.

93 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of January 8th, 1918.

No. 3164.

WILLIAM SCHALL, JR., et als.

versus

FREDERIC CAMORS et als., Trustees of Estates of Albert Le More and Edward E. Carriere, Bankrupts.

On this day this cause was called, and, after argument by Eugene Congleton, Esq., for appellants, and Monte M. Lemann, Esq., for appellees, was submitted to the Court.

Opinion of the Court.

Original Filed January 17th, 1918.

In the United States Circuit Court of Appeals, Fifth Circuit:

Number 3163.

WILLIAM SCHALL, JR., et als., Petitioners,

v.

FREDERICK CAMORS et als., as Trustees of Estates of Albert Le More
and Ed. E. Carriere, Bankrupts, Respondents.

Petition to Superintend and Revise from the District Court of the
United States for the Eastern District of Louisiana.

Number 3164.

WILLIAM SCHALL, JR., et als., Appellants,

v.

FREDERICK CAMORS et als., as Trustees of Estate of Albert Le More
and Ed. E. Carriere, Bankrupts, Appellees.

Appeal from the District Court of the United States for the Eastern
District of Louisiana.

Howe, Fenner, Spencer & Cocke and Rounds, Hatch, Dillingham
& Debevoise, for petitioners-appellants.

J. Blanc Monroe, D. B. H. Chaffe, and Monte M. Lemann, for
respondents-appellees.

Before Walker and Batts, Circuit Judges, and Grubb, District
Judge.

GRUBB, *District Judge*, delivered the opinion of the court.

95 These cases were submitted together, No. 3,163 being a
petition to revise an order of the District Court sitting in
bankruptcy, disallowing a claim against the bankrupt estate,
and No. 3,164 being an appeal from the same order. As appeal is
the proper remedy, the petition to revise is ordered dismissed at
petitioner's costs.

The appeal presents the question as to whether a claim in its
nature a tort, arising out of a partnership transaction, may be proven
against the individual estates of the partners, when the claim has
been filed and allowed as a claim in contract against the partnership
estate. This involves two questions, (1) whether a claim in tort is

provable at all, under Section 63 of the Bankrupt Act of 1898, and (2) whether in case of a partnership transaction, it may be proven doubly—against the estate of the partner and that of the partnership.

We find it unnecessary to consider the first much litigated question, because of the conclusion we have reached upon the second.

The Bankruptcy Act of 1898, even to a greater extent than its predecessors, recognizes the separation between a partnership and its members. It permits an adjudication of the partnership, as an entity, as distinguished from the individuals composing it. It provides that the partnership creditors shall appoint the trustee; provides that the trustee shall keep separate accounts of partnership property and that of the members of the firm; that there shall be a division in the payment of expenses of administration between the partnership and individual estates, as directed by the court; that the net proceeds of partnership property shall be first appropriated to pay partnership debts, and the net proceeds of the estate of an individual partner be first appropriated to pay his individual debts; each class to have resort only to the surplus of the other, if any exists; that the court may permit the proof of claim of the
96 partnership estate against individual estates and vice versa, and may marshal the assets of both classes of estates to secure an equitable distribution of property of the several estates.

The scheme of administration for partnerships by Section 5 of the present act shows the purpose to administer partnership estates according to the equitable principle of devoting partnership property primarily to the payment of partnership debts, and individual property primarily to the payment of the debts of the individual partner. The machinery provided by Section 5 is adapted for administration on this line. Recent decisions of the Supreme Court have emphasized the purpose of the statute in this respect. In the case of *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496-506, the court held that the distribution provided by Section 5, preferring individual creditors of a partnership in the distribution of his individual property, would overrule a contrary rule, that obtained in the state of the domicile of the bankrupt. In the case of *Farmers Bank v. Ridge Avenue Bank*, 240 U. S. 498, the court held that the method of distribution, provided in Section 5, admitted of no exception, even though the partnership, and all of its members, were insolvent, and the only fund for distribution was produced by the assets of one of the members; departing in this respect from the contrary rule in England.

In the administration of the present bankrupt law, therefore, the principle of the devotion of partnership assets to satisfy partnership debts, before the creditors of the individual members can resort to them for payment, and the reverse of this rule, should not lightly be departed from.

If one, who is a creditor of the joint or partnership estate, is permitted to prove his claim against both the partnership estate and the individual estate of one or more of the partners, the principle would be infringed, if the partner or partners had individual credit-

97 ors. If, in this case, the appellants were partnership creditors, their claim against the individual estates of the partners was properly disallowed. The effect of its allowance would have been to enable the partnership creditor to share in the individual property of the partners on an equality with the individual creditors of the partners.

It is contended by appellants that they were creditors both of the partnership and of the individual members. The facts from which their claims arise are not in dispute. The appellants were induced to purchase drafts of the bankrupt firm, supposed to be secured by bills-of-lading representing shipments of staves, through false representations made to them or contained in the forged or fraudulent bills-of-lading that were attached to the drafts. The drafts were not paid. The claim, proven against the partnership, was upon the drafts, as partnership obligations in contract. The claims, attempted to be proven against the individual estates of the partners, were for damages for the false representation, alleged to have been made by the partners. The partners were cognizant of the frauds, though the particular drafts were not signed or endorsed or negotiated by either partner, and neither partner profited from the transaction except through his interest in the firm. The transaction was one in the ordinary course of the firm business, except that it was a fraudulent one, and the proceeds of the drafts went to the credit of the firm and were used in the conduct of its business. Eliminating its fraudulent character, the transaction was altogether a partnership one, and would have supported proof of claim only against the partnership estate. It is contended that the commission of the fraud was the act of the partners, even though they did not, in person, sign and negotiate the drafts, because the fraud of their agent was indisputable to them, and because they knew of the fraudulent system, under which the firm was doing business. If the act of the partners, then the contention is that it will support a claim against the partners individually, which can be proven in bankruptcy against their individual estates, either as a tort or upon the theory of waiver of its tortious character. We do not think that the policy of the bankrupt law to subordinate firm creditors to the creditors of the partners individually in sharing the individual assets of the partners, would permit us to entertain such a fiction. We think the determination as to whether the claim is partnership or individual or both, should depend upon the real character of the transaction, and, if that be unmistakably an exclusive partnership one, neither fiction nor implication should be resorted to to give it a different character. If the partners had by separate contract of guaranty obligated themselves to the claimants, such separate contract would have afforded a basis for a claim against their individual estates. So, if it had been shown that their individual estates had been enriched by the transaction complained of, or that they had been guilty of a separate and personal delinquency from that of the partnership, an individual obligation to make restitution to the injured claimant might have been implied. In the absence of a separate, individual obligation, or a showing of benefit moving to the

partner individually from the transaction, we can see no reason for sustaining a double proof of claim in favor of the implied obligation, when it would not be sustained where the obligation is an express one. Each partner and his property is individually liable for all partnership debts as between him and the partnership creditor, and this obligation is joint and several at the option of the creditor. But as between his individual and partnership creditors, under the bankrupt law, the primary liability of his property is to the former. It

would be contrary to the policy of the bankrupt law to permit the firm creditor by invoking such a technical rule of law, to place himself on a parity with the individual creditors of the partners as to his individual assets, and so circumvent the equitable distribution of partnership assets among firm and individual creditors provided for in the act.

The question has been answered differently by the Circuit Courts of Appeal in the First and Second Circuits. The case of *in re Coe*, 183 Fed. 745, (Circuit Court of Appeals, Second Circuit), is contrary to the view expressed; while the case of *Reynolds v. New York Trust Co.*, 188 Fed. 611, (Circuit Court of Appeals, First Circuit), directly supports it.

The order of the District Court, disallowing the claim of appellants against the individual estates of the partners is

Affirmed.

Judgment.

Extract from the Minutes of January 17th, 1918.

No. 3164.

WILLIAM SCHALL, JR., et als.

versus

FREDERIC CAMORS et als., Trustees of Estates of Albert Le More and Edward E. Carriere, Bankrupts.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, William Schall, Jr., Carl Muller, Edmund Pavenstedt, and Frederick Muller Schall, and the surety on the appeal bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 93 to 100 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3164, wherein William Schall, Jr., et als. are appellants, and Frederic Camors et als., Trustees of Estates of Albert Le More and Edward E. Carriere, Bankrupts, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 92 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 18th day of March, A. D. 1918.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,

Clerk of the United States Circuit Court of Appeals.

101 In the United States Circuit Court of Appeals for the Fifth Circuit.

Number 3164.

WILLIAM SCHALL, JR., et als., Appellants,
versusFREDERIC CAMORS et als., Trustees of Estates of Albert Le More and
Edward E. Carriere, Bankrupts.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of Certiorari, I now hereby certify that, on the fourth day of June, A. D. 1918, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

"United States Circuit Court of Appeals for the Fifth Circuit.

WILLIAM SCHALL, JR., et als., Appellants,
against

FREDERIC CAMORS et al., Trustees of Estates of Albert Le More and
Edward E. Carriere, Bankrupts, Appellees.

In the above entitled cause, It Is Hereby Stipulated that the certified transcript of record herein on file in the office of the Clerk of the Supreme Court of the United States in the matter of William Schall, Jr., et als., petitioners, for a writ of certiorari against Frederic Camors et al., respondents, and there numbered 976 of October Term, 1917, upon the docket of said Court, may be taken as a return by this Court to the writ of certiorari issued by the Supreme Court of the United States in the said case.

New Orleans, La., June 4th, 1918.

(Signed) D. B. H. CHAFFE,
HALL, MONROE & LEMANN,
Attorneys for Appellees.

(Signed) ROUNDS, HATCH, DILLINGHAM &
DEBEVOISE,

(Signed) HOWE, FENNER, SPENCER & COCKE,
Attorneys for Appellants."

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 5th day of June, A. D. 1918.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of
Appeals for the Fifth Circuit.*

102 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which William Schall, Jr., et al., are appellants, and Frederick Camors et al., as Trustees of Estates of Albert Le More and Ed. E. Carriere, Bankrupts, are appellees, No. 3164, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Dis-

trict Court of the United States for the Eastern District of Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without
 103 delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-third day of May, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

104 [Endorsed:] File No. 26443. Supreme Court of the United States, No. 976, October Term, 1917. William Schall, Jr., et al. vs. Frederic Camors et al., Trustees, etc. Writ of Certiorari. #3164. In the United States Circuit Court of Appeals, Fifth Circuit. Filed 4th day of June, 1918. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

105 [Endorsed:] No. 3164. United States Circuit Court of Appeals for the Fifth Circuit. William Schall, Jr., et al., Appellants, vs. Frederic Camors et al., Trustees of Estate of Albert Le More and Edward E. Carriere, Bankrupts, Appellees. Writ of Certiorari, and Return thereto. 976—26443.

106 [Endorsed:] File No. 26443. Supreme Court U. S., October Term, 1917. Term No. 976. William Schall, Jr., et al., Appellants, vs. Frederic Camors et al., Trustees, etc. Writ of certiorari and return. Filed June 8, 1918.

No. 841784

FILED
APR 16 1918

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM—1917.

WILLIAM SCHALL, JR., et als.,
Petitioners,

against

FREDERICH CAMORS et al., Trustees of Es-
tates of Albert LeMore and Edward E.
Carriere, Bankrupts,

Respondents.

**PETITION FOR WRIT OF CERTIO-
RARI, NOTICE OF MOTION, MO-
TION AND BRIEF ON BEHALF OF
PETITIONER.**

RALPH S. ROUNDS,
Attorney for Petitioner,
62 Cedar Street,
New York, New York.

EUGENE CONGLETON,
of Counsel.



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Notice of Motion.

IN THE

Supreme Court of the United States

OCTOBER TERM—1917.

WILLIAM SCHALL, JR., et als., Petitioners, against FREDERICK CAMORS, et al., Trus- tees of Estates of Albert Le- More and Edward E. Carriere, Bankrupts, Respondents.	}
--	---

Sirs:

PLEASE TAKE NOTICE that upon a certified copy of the transcript of the record herein and upon the annexed petition of William Schall, Jr., Carl Muller, Edmund Pavenstedt and Frederick Muller-Schall, sworn to on the 15th day of April, 1918, I shall make the motion hereto annexed before the Supreme Court of the United States, at the Capitol in the City of Washington, District of Columbia, on the 6th day of May, 1918, at the opening of

court on that day or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York, April 15, 1918.

Yours, etc.,

RALPH S. ROUNDS,
Attorney for William Schall, Jr., et als.,
Petitioners,
62 Cedar Street,
New York City, New York.

To

HALL, MONROE LEMANN,
D. B. H. CHAFFE,
Attorneys for Frederick Camores,
Nicholas Riviere and R. M. Walms-
ley, Trustees in Bankruptcy,
Respondents.

Motion.**IN THE****SUPREME COURT OF THE UNITED STATES,****OCTOBER TERM—1917.**

WILLIAM SCHALL, JR., et als.,	}
Petitioners,	
against	
FREDERICK CAMORS, et al., Trus-	
tees of Estates of Albert Le-	
More and Edward E. Carriere,	}
Bankrupts,	
Respondents.	

Now come the petitioners herein, William Schall, Jr., Carl Muller, Edmund Pavenstedt and Frederick Muller-Schall, by Ralph S. Rounds, Esq., their attorney, and move this Honorable Court upon a certified copy of the transcript of the record herein and upon the annexed petition, sworn to on the 15th day of April, 1918, for a writ of certiorari directed to the Circuit Court of Appeals for the Fifth Circuit, to bring before this Honorable Court the case of William Schall, Jr., et als., appellants, against Frederick Camors, et als., Trustees of Estates of Albert LeMore and Edward E. Carriere, bankrupts, appellees, recently decided by the Circuit Court of Appeals for the Fifth Circuit, for such proceedings therein as to this Court may seem just, and for such other and further relief in the premises as may be just.

RALPH S. ROUNDS,
 Attorney for Petitioners,
 62 Cedar Street,
 New York City, New York.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1918.

WILLIAM SCHALL, JR., et als.,	}
Petitioners,	
against	
FREDERICK CAMORS et als., as	
Trustees of the Estates of	}
Albert LeMore and Ed. E.	
Carriere, Bankrupts,	
Respondents.	

To the Honorable the Supreme Court of the United
States:

Your petitioners respectfully show:

I. On the 8th day of May, 1914, Albert LeMore and Ed. E. Carriere, individually and as co-partners doing business under the firm names of A. LeMore & Company and Ed. E. Carriere & Company, were adjudicated bankrupts in the United States District Court for the Eastern District of Louisiana, New Orleans Division. On the 8th day of May, 1915, within the period allowed by law, Muller, Schall & Company, the petitioners herein, filed a proof of claim against the partnership and also separate proofs of claim against the individual estates of A. LeMore and Ed. E. Carriere.

The proof of claim against the partnership was based upon certain drafts and checks signed by A.

LeMore & Company and sold by them to Muller, Schall & Company. This claim was allowed by the referee as a claim on contract upon the several notes and checks set forth in the proof of claim and has not been questioned.

The other two proofs of claim were filed, one against Albert LeMore, individually, and one against Ed. E. Carriere, individually, and set forth the same facts. They allege that the drafts and checks mentioned therein (being the same drafts and checks mentioned in the proof of claim against the partnership estate) were sold to Muller, Schall & Company on the strength of fraudulent misrepresentations set forth in a written statement made by the individual partners that the partnership was a solvent concern, with large assets in excess of its liabilities, and engaged in a legitimate and profitable business; that said representations were false and fraudulent at the time they were made, and that said partnership was at all times in question insolvent, with assets much less than its liabilities.

The proofs of claim against the individual partners also set forth that the individual partners represented to Muller, Schall & Company, for the purpose of inducing them to purchase the drafts, that the respective drafts were secured by large shipments of staves, to wit, the staves described in the respective bills of lading accompanying the drafts, and that the drafts were drawn upon the purchasers of said staves in the ordinary course of business and as a means of payment therefor, and that the respective drawees of said drafts upon their acceptance thereof would receive valuable property to provide for the payment thereof at maturity; whereas in truth and in fact, no staves were shipped

to the drawees of said drafts and said bills of lading did not represent any shipment of staves whatever and said drafts were not drawn upon purchasers of staves as a means of providing payment therefor, and on the acceptance of said drafts, the drawees did not receive any property from said partnership or from any person to provide for their payment, and that at all the times mentioned in the said proof of claim the partnership of A. LeMore & Company was engaged in an unprofitable business largely based on misrepresentation, all of which said Albert LeMore and Ed. E. Carriere well knew; and that said transactions with Muller, Schall & Company were wholly false and fraudulent to their knowledge and were intended to defraud Muller, Schall & Company.

II. The trustees of the individual estates of A. LeMore & Company, after the filing of said proofs of claim against the individual estate of Albert LeMore and the individual estate of Ed. E. Carriere, moved to expunge and disallow the said claims. The referee granted this motion and the order made by him has been affirmed by the District Court and by the Circuit Court of Appeals for the Fifth Circuit.

The trustees did not put in issue the allegations contained in the proofs of claims against the individual partners but introduced testimony before the referee that the drafts were sold to Muller, Schall & Company in New York, through an agent of A. LeMore & Company, one Trippe, and the moneys received from the sale of the said drafts were applied to the uses of the partnership. Accordingly there has been no dispute as to the facts,

and the Circuit Court of Appeals in its opinion states:

"The facts from which these claims arise are not in dispute. The appellants were induced to purchase drafts of the bankrupt firm, supposed to be secured by bills of lading representing shipments of staves, through false representations made to them or contained in the forged or fraudulent bills of lading that were attached to the drafts."

III. The referee in deciding that the motion of the trustees to expunge the claims against the individual partners should be granted, in a lengthy opinion set forth at pages 44 to 70 of the record, decided in effect that such claims were claims sounding in tort and not in quasi contract; that under Section 63 of the Bankruptcy Act tort claims could not be proved and that in any event under Section 5f of the Bankruptcy Act the assets of the estates should be marshalled so that the claims against the individual partners, though based on frauds arising out of the contracts set forth in the proof of claim against the partnership, would not be entitled to participate in dividends from the assets of the individual estates. The District Court adopted the findings of the referee:

IV. The Circuit Court of Appeals in its decision refused to pass upon the question as to whether or not the claims against the individual partners might be proved as tort claims or as claims in quasi contract, but squarely held that under Section 5 of the Bankruptcy Act the claimant was not entitled to file proofs of claim against the

partnership estate based upon the contract and separate claims against the individual partners for fraud in inducing the making of the contract.

V. Accordingly the Circuit Court of Appeals was called upon to decide two important questions, involving the construction of two sections of the Bankruptcy Act (Sections 63a and b and Section 5f), neither of which questions has ever been presented to and decided by this Court.

First, whether or not a claim for damages for fraud consciously perpetrated by the members of a partnership whereby the partnership received moneys which would not have been obtained but for the fraudulent acts of the partners, is under any circumstances provable in bankruptcy against the individual estates of the partners as a tort claim or as a claim in quasi contract. This question, which depends to some extent for its solution upon the decision of the more general question of the provability of tort claims in bankruptcy, the Circuit Court of Appeals refused to decide.

Second, whether or not in a case where partnership assets and individual assets of the partners are being administered in bankruptcy, and the creditor has a right to prove against the partnership on contract, he is precluded from proving separate claims against the individual partners for fraud in inducing the making of the contract. This question the Circuit Court of Appeals decided in the negative, expressly recognizing that in so doing its decision was contrary to the decision of the Circuit Court of Appeals of the Second Circuit in

the case of *In Re Coe*, 183 Fed., 745. The Court said:

"The question has been answered differently by the Circuit Court of Appeals in the First and Second Circuits. The case of *In re Coe*, 183 Fed., 745 (Circuit Court of Appeals, Second Circuit), is contrary to the view expressed, while the case of *Reynolds vs. New York Trust Co.*, 188 Fed., 611 (Circuit Court of Appeals, First Circuit) directly supports it."

VI. This Court has never definitely passed upon or decided the important question in bankruptcy administration as to whether or not a tort claim is provable in bankruptcy. The Circuit Court of Appeals in many of the circuits have held that such a claim is not provable, but the Circuit Court of Appeals for the Fifth Circuit in the case of *Jackson vs. Wachula Manufacturing Co.*, 230 Fed., 409, more particularly discussed at pages 19 to 21 of our brief hereto annexed, refused to regard these decisions as controlling, and in the case at bar considered the question as an open one and refused to pass upon it.

VII. We shall show in our brief hereto annexed, pages 14 to 47, that both by reason of a proper construction of the statute and by reason of a proper and consistent bankruptcy practice under it, and by reason of legislative construction, the Bankruptcy Act should be construed to admit tort claims to proof.

VIII. We shall also show at pages 48 to 51 of our brief hereto annexed that in any case the claims for fraud filed against the estates of the in-

dividual partners herein are provable as claims in quasi contract.

IX. We shall also show at pages 52 to 63 of our brief hereto annexed that the liability of the individual partners for obtaining moneys by false representations was several, whether the individual claims are regarded as claims in tort or in quasi contract.

X. We shall also show at pages 63 to 67 of our brief hereto annexed that the claims attempted to be proved against the individual partners are individual claims binding on their individual estates and not partnership claims binding only upon the partnership estate, and that the Circuit Court of Appeals erred in holding on the undisputed facts that they were partnership claims.

XI. We shall also show at pages 67 to 71 of our brief hereto annexed that no application of the principles of marshalling or of Section 5 of the Bankruptcy Act operate to prevent the proof and allowance of the claims against the estates of the separate parties.

XII. The questions which your petitioner desires to review in this Court are:

1. Were the claims filed against the individual estates of the partners of A. Lemore & Company provable as claims in tort?

2. Were the claims presented against the individual estates of the partners of A. Lemore & Company provable as claims in quasi contract?

3. Are the claimants precluded by Section 5 of the Bankruptcy Act from proving a claim in contract against the partnership and claims against the individual members of the partnership for fraud in inducing the making of the contract?

Your petitioner respectfully submits that these questions are of sufficient importance to require the issuance of a writ of certiorari for the following reasons, among others:

1. In order to settle the much litigated question which this Court has never decided involving a construction of Sections 63a and b of the Bankruptcy Act as to whether or not tort claims are provable in bankruptcy and as to which the Circuit Court of Appeals of the Fifth Circuit has not regarded the decisions of the Circuit Courts of Appeals of other circuits as controlling.

2. In order to settle the conflict of authority between the Circuit Court of Appeals of the Second Circuit in the case of *In re Coe* and the decision of the Circuit Court of Appeals of the Fifth Circuit in the case at bar involving a construction of Section 5 of the Bankruptcy Act.

3. Because your petitioner will suffer great hardship and damage and be remediless unless the writ of certiorari issues.

Submitted and filed herewith is a certified transcript of the record of the proceedings in the United States District Court for the Eastern District of Louisiana, New Orleans Division, as the same were filed and acted upon by the Circuit Court of

Appeals for the Fifth Circuit, together with certified copies of the proceedings and opinion of the Circuit Court of Appeals for the Fifth Circuit and of the order made by that court affirming the judgment and the order of the District Court and the order of the Referee.

WHEREFORE, your petitioner respectfully prays that this honorable Court be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Fifth Circuit to bring up this case to the honorable Court for such proceedings therein as may be just.

WILLIAM SCHALL,
CARL MULLER,
EDMUND PAVENSTEDT,
FREDERICK MULLER-SCHALL,
Petitioners.

RALPH S. ROUNDS, Esq.,
Attorney for Petitioners,
62 Cedar Street,
New York City, New York.

State of New York,
County of New York, }
Southern District of New York, } ss.:

Carl Muller, being duly sworn, deposes and says I am one of the petitioners herein; I have read the foregoing petition and know the contents thereof and the same is true to the best of my knowledge, information and belief.

CARL MULLER.

Subscribed and sworn to before me
this 15th day of April, 1918.

WILLIAM H. WILSON,
Notary Public,
Kings County.

Certificate filed in New York County.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the cause is such that the prayer of the petitioners should be granted by this Court.

RALPH S. ROUNDS,
Attorney for Petitioners.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM—1917.

WILLIAM SCHALL, JR., et als., Petitioners, against FREDERICK CAMORS, et al., Trus- tees of Estates of Albert Le- More and Edward E. Carriere, Bankrupts,	}	Respondents.

PETITIONER'S BRIEF.

I.

The claims filed by Muller, Schall & Co. against the separate estates of Albert Lemore and Edward E. Carriere are provable in bankruptcy as tort claims.

The question as to whether or not a claim for pure tort is provable in bankruptcy, has, strange to say, after the nineteen years that the bankruptcy act has been in operation, never been definitely decided by this Court. The ultimate decision will rest upon the construction given to subsection b of Section 63 of the Bankruptcy Act.

In *Crawford vs. Burke*, 195 U. S., page 176, the defendant-in-error directly raised the question of the provability of tort claims under Section 63b, and discussed the question at length in his brief, contending that no tort claims could be proved in bankruptcy, but this Court said (195 U. S., at page 186) :

"Provable debts are defined by Section 63, a copy of which appears in the margin. Paragraph a of this section includes debts arising out of contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph b, two constructions are possible: It may relate to all unliquidated demands or only to such as may arise upon such contracts, express or implied, as are covered by paragraph a.

Certainly paragraph b does not embrace debts of an unliquidated character and which in their nature are not susceptible of being liquidated (*Dunbar vs. Dunbar*, 190 U. S., 340, 350). Whether the effect of paragraph b is to cause an unliquidated claim which is susceptible of liquidation but is not literally embraced by paragraph a, to be provable in bankruptcy, we are not called upon to decide."

In the earlier case of *Dunbar vs. Dunbar*, 190 U. S., 340, this Court expressed the opinion (which, however, was not necessary to a decision of the case) that subsection b adds nothing to the class of debts which may be proved. This expression, however, was in accord with the contentions of counsel for both parties. Counsel for the plaintiff-in-error, at page 20 of his brief, saying:

"Paragraph b does not enlarge the class of debts which may be proved but provides that claims within the scope of paragraph a, if unliquidated, may be liquidated and proved."

The brief for the defendant-in-error, on page 5, stated :

"The only reference in the Act of 1898 to contingent claims, even by construction, other than that of the surety of a bankrupt (Sec. 57i) is contained in Section 63b. This paragraph, however, does not in any way enlarge the class of debts which may be proved, but provides that, if any claim coming within the scope of Section 63 is unliquidated, it may be liquidated and proved."

Both counsel therefore conceded without discussion in the Dunbar case that Section 63b did not extend the enumeration in Section 63a and stated the proposition in almost identical terms and this Court adopted the statement of counsel in the briefs without undertaking an analysis of the statute.

As this Court in its decision in *Crawford vs. Burke*, refused to follow its dictum in *Dunbar vs. Dunbar*, and confined the operation of that case to what was actually decided, viz., that paragraph b of Section 63 does not embrace debts of an unliquidated character and which in their nature are not susceptible of liquidation, it thereby left the question as to the operation of Section 63-b open for future decision. And the point has never since been presented to and decided by this Court, although there are strong intimations in *Friend*

vs. *Talcott*, 228 U. S., 27 and in *Clarke vs. Rogers*, 228 U. S., 534, that tort claims are provable.

In *Friend vs. Talcott*, 228 U. S., 27, at page 39, Chief Justice White, writing for the Court, in commenting on provable debts said:

"Thus Section 63 a and b (30 Stat., 562) enumerates the debts which may be proved and which are therefore entitled to participate in the benefits of the act and are bound by its provisions, including a discharge."

In *Clarke vs. Rogers*, 228 U. S., 534, a case involving the embezzlement of trust funds in which it was very difficult to work out a contract, implied in law or in fact, this Court, although holding that a contract in law to repay the embezzled funds did exist, also justified the decision upon the additional ground that in any case the embezzlement of the moneys constituted a provable debt against the bankrupt estate. The Court said at page 548:

"This ruling brings the case at bar within *Crawford vs. Burke* and *Tindle vs. Birkett*, even if their application be as limited as appellant contends. It may be questioned if they are so limited. They recognize the relation of Section 63a to Section 17. Section 17 excludes certain debts from discharge, among others, those created by the bankrupt's 'fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.' It was said in *Crawford vs. Burke*, 'If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted

from the operation of the discharge?" The question was pertinent in view of the language of the section. It provides that 'a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as,' etc. The relation of the section was also recognized in *Friend vs. Talcott*, ante, page 27. It is there declared that Sec. 17 enumerates the debts provable under Sec. 63a which are not discharged. Among them, we have seen, are those created by fraud, embezzlement, misappropriation or defalcation in any fiduciary capacity. It would seem, therefore, to follow that the conversion of trust funds creates a liability provable in bankruptcy."

Collier on Bankruptcy, 9th Ed., page 853, considers the subject as follows:

"Liabilities grounded in contract are, almost without exception, provable. So also are judgments grounded in tort. Whether mere liabilities *ex delicto* may be liquidated and thus become provable has been doubted. Under the former law such claims, if 'on account of any goods or chattels wrongfully taken, converted or withheld,' i. e., if in conversion, were provable, but only after being duly liquidated. With the single exception next noted, other liabilities sounding in tort were, by the terms of another section, made provable, but were also declared not dischargeable. Even the clause above quoted has been omitted from the present law; the same is silent as to the provability of debts in fraud or for embezzlement. Hence, the argument that such mere

liabilities are not provable. But, strictly, debts grounded in tort are as much liabilities as are those entirely *ex contractu*, and a distinction between those actually liquidated at the time the petition is filed and those which may be is somewhat artificial. Besides, Sec. 17 now excepts from dischargeable debts many 'provable debts' that are unliquidated torts; the words 'judgments in actions' in Sec. 17-a (2) having now given place to the word 'liabilities.' It would seem, therefore, that liabilities for torts *per se*, and not merely those provable on the theory of quasi-contracts, may now be liquidated and proven and allowed, at least all those that are both *in praesenti* debts as (distinguished from fines or duties) and are excepted from the effect of a discharge by Sec. 17."

Cases in the Circuit Court of Appeals, among others, *Brown & Adams vs. United Button Company*, 140 Fed., 495; affirmed 149 Fed., 48, and *In re New York Tunnel Co.*, 159 Fed., 688, have held that a tort claim is not provable but these authorities have been questioned by a recent case in the Circuit Court of Appeals of the Fifth Circuit (*Jackson vs. Wachula Mfg. Co.*, 230 Fed., 409).

In the case last cited (*Jackson vs. Wachula Mfg. Company*), which involved an application by a tort creditor to resist an adjudication by putting in issue the allegations of insolvency and of acts of bankruptcy set forth in the petition, one of the questions before this Court was whether or not a claim for personal injuries was a provable claim in bankruptcy. This Court said:

"Two propositions were involved in the ruling, viz.: (1) That the maker of the motion was not a creditor within the meaning of the Bankruptcy Act when the involuntary petition was filed; and (2) That only such a creditor may be permitted to resist such a petition. The first proposition is supported by decisions which are entitled to much weight, among them the following, which were cited by the District Judge: *Brown & Adams vs. United Button Company* (C. C. A., 3rd Cir.), 17 Am. B. R., 565, 149 Fed., 48; *In re New York Tunnel Company* (C. C. A., 2d Cir.), 20 Am. B. R., 25, 159 Fed., 688; *In re New York Tunnel Company* (C. C. A., 2d Cir.), 21 Am. B. R., 531, 166 Fed., 284, 92 C. C. A., 202. So far as we are advised, the proposition has not been definitely settled by the Court whose decisions are controlling. The contention made by counsel in this case may be summarized as follows: The liability adjudged in favor of the petitioner for revision, being for a personal injury which was not 'wilful and malicious,' is one which a discharge in bankruptcy of the defendant in the judgment would release; and any demand founded on a liability subject to be so released may, when liquidated and fixed by a judgment, be proved and allowed against the debtor's estate in bankruptcy, and the claim, being of a kind that may be made provable and allowable, the claimant's right, given by provisions of the Act, to participate in the bankruptcy proceeding, is not dependent upon his claim having been liquidated and fixed by a judgment, when the latter is necessary to make it prov-

able and allowable, before the proceeding was instituted. Bankruptcy Act, Secs. 17, 59f, 63b; *Grant Shoe Company vs. Laird Company*, 212 U. S., 445, 21 Am. B. R., 484, 29 Sup. Ct., 332, 53 L. Ed., 591; *Tinker vs. Colwell*, 193 U. S., 473, 11 Am. B. R., 568, 24 Sup. Ct., 505, 48 L. Ed., 754; *Crawford vs. Burke*, 195 U. S., 193, 12 Am. B. R., 659, 25 Sup. Ct., 9, 49 L. Ed., 147. We do not find it to be necessary to a decision of this case to affirm or deny the correctness of the first-stated proposition. Whether the maker of the motion was or was not a creditor within the meaning of the Bankruptcy Act, that he had, when he presented the motion an interest to be served by favorable action on it is not open to question."

The structure of Section 63 indicates very plainly that "unliquidated claims" in sub-section b covers an additional and distinct class of provable debts.

The title of Section 63 is "Debts which may be proved." Embraced within this title are two sub-sections a and b of equal dignity of arrangement and embracing, as we believe, two classes of provable debts.

- (a) Debts (or liquidated claims).
- (b) Unliquidated claims.

The title is equally applicable to both of the sub-sections and if one sub-section enumerates debts which may be proved, so should the other.

This Court in *Knowlton vs. Moore*, 178 U. S., 41, at page 65, in considering a question of statutory

construction gave great weight to the heading of the section of the statute which it construed and said:

"On the very threshold, the theory that the tax is not on particular legacies or distributive shares passing upon a death, but is on the whole amount of the personal property of the deceased, is rebutted by the heading, which described what is taxed, not as the estates of deceased persons, but as 'legacies and distributive shares of personal property.' This, whilst not conclusive, is proper to be considered in interpreting the statute, when ambiguity exists and a literal interpretation will work out wrong or injury. *United States vs. Fisher*, 2 Cranch, 358, 386; *United States vs. Palmer*, 3 Wheat., 610, 631; *United States vs. Union Pacific Railroad*, 91 U. S., 72; *Smythe vs. Fiske*, 23 Wall., 374, 380; *Coosaw Mining Co. vs. South Carolina*, 144 U. S., 550."

Having in mind that the structure of Section 63a and b indicates two separate classes of individual claims, it becomes important to consider why this structure was adopted. This question is readily answered when it is perceived that Section 63 is not only an enumeration of two classes of "debts which may be proved" but in connection with the enumeration each sub-section states the manner of proof of the claims embraced within it. Debts enumerated in Sub-section a because they are liquidated or capable of being liquidated by mere computation need only be proved and allowed, while the unliquidated claims covered by Sub-section b require

judicial proceedings to determine the amount of the claim and must therefore first be liquidated by such proceedings and thereafter proved and allowed. The enumeration of claims in sub-section a was, we believe, for the purpose of defining the procedure in connection with such claims, and in fact the whole section is framed with reference to the procedure for proving the different classes of claims.

It therefore follows that if Section 63a is merely an enumeration of "debts" which may be proved and allowed without further proceedings because of their liquidated nature, it does not embrace "unliquidated claims" of any kind arising out of contract or otherwise, and "unliquidated claims" not being included in Section 63a but being a part of the enumeration of "debts which may be proved," are therefore an additional and distinct class of claims provable under Section 63b.

That the enumeration of different classes of claims in Section 63a is not intended as an enumeration of debts which may be proved, but only as an enumeration of debts which may be *proved and allowed* without preliminary liquidation by the Court, is clearly indicated by a consideration of 63a (5), which relates to claims:

"(5) Founded upon provable claims reduced to judgment, after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment."

If Section 63a, subdivisions (1) to (4) embrace the whole range of provable claims it was not necessary and was indeed foolish to add subdivision (5) embracing claims "founded on provable debts reduced to judgment after the filing of the petition." If the claim is already a provable claim and is already provided for in subdivisions 1 to 4, reducing it to judgment will not alter or affect its provable character. (*Boynton vs. Ball*, 121 U. S., 457.) It follows therefore that Section 63a (5) relates not to the provability of a claim reduced to judgment after the filing of the petition but to the manner of proof of such a claim.

Section 63a (5), therefore, does not pretend to add to the enumeration of provable claims, if Section 63a (1) to (4) be deemed to be such an enumeration, but simply relates to the form which a claim may take in order to be proved and allowed without further proceedings. This we have contended is also the character of every other debt enumerated in Section 63a and seems to us to show conclusively that 63a is not intended to be an enumeration of provable debts exclusive of all other kinds of debts, demands and claims, but is only an enumeration of claims which because of their form need no assessment of damages and can be made certain by simple computation and are therefore outside the class of claims which must "pursuant to application to court be liquidated in such manner as it shall direct and may thereafter be proved and allowed."

The cases which hold that sub-section b, in spite of its inclusion with paragraph a in a section entitled "Debts which may be proved" (*Brown & Adams vs. United Button Co.*, 140 Fed., 495, af-

firmed 149 Fed., 48, and *In re New York Tunnel Co.*, 159 Fed., 688), adds nothing to the enumeration of paragraph a, have admitted that under their construction all the debts enumerated in 63a are liquidated claims except those embraced in the last part of 63a (4) which embraces "debts * * * founded upon an open account, or upon a contract, express or implied" and in order to limit Section 63b and to give it some application, have applied it to the last part of Section 63a (4) irrespective of the fact that every other "debt" enumerated in 63a is a liquidated demand.

The construction upheld by these cases does violence to the rule of *noscitur a sociis* which, in every case of ambiguity, is an important canon of construction; for even if the words "founded upon * * * a contract, express or implied" as a part of sub-section a (4) were not qualified by their enumeration as debts (the latter term at the beginning of sub-section a, as we shall show below, being employed in its narrow sense), they are preceded, followed and associated in the same phrase with demands of a liquidated nature. For all the purposes of sub-section a the words "founded upon * * * a contract, express or implied" should be limited to the same class of liquidated claims with which they are associated.

Neal vs. Clark, 95 U. S., 704, is the leading Federal case on the application of the rule of *noscitur a sociis* to statutory construction. The Court was called upon to decide whether the word "fraud" as used in the thirty-third section of the Bankruptcy Law of 1867, which provided that "no debt created by the fraud or embezzlement of the bankrupt, or

by defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act," meant positive fraud or fraud in fact, involving moral turpitude or intentional wrong, or implied fraud or fraud in law which may exist without the imputation of bad faith or immorality.

The Court held that the word fraud for the purposes of that section should be given a limited construction, and said:

"It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' So, also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.' In Broom's Legal Maxims, page 450, it is said: 'It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*,—the coupling of words together shows that they are to be understood in the same sense. And where the meaning of any particular word is doubtful or obscure, * * * the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words,' the same author says (page 455): 'In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact,

ejusdem generis, and referable to the same subject matter.'

Applying these rules to this case, we remark, that, in the section of the law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."

The reasoning of the Court in *Neal vs. Clark* is particularly pertinent in arriving at a proper construction of Section 63-a of the present Bankruptcy Act.

Any construction which limits the application of 63b to the last part of Section 63a (4) does violence to the arrangement of the sub-sections a and b. If Section 63b has no independent operation and no operation at all except in connection with the last part of Section 63a (4), why were its provisions not incorporated into 63a instead of being dissociated from Section 63a and set forth in another sub-section which has no grammatical or formal connection with Section 63a and is in form absolutely independent of that sub-section although embraced within the same title of "debts which may be proved."

A construction of Section 63 allowing proof of tort claims in accordance with the structure and words of the Section is supported by considering Section 63 together with other Sections of the Bankruptcy Act.

Section 1 of the Bankruptcy Act of 1889 defines a debt as follows (Subdivision 11):

“Debts shall include any debt, demand or claim provable in bankruptcy.”

The word “Debts” in the subject of this definition sentence obviously has a different meaning from the mere plural of the word “debt” in the predicate. The word “debts” in the subject is used in a general sense embracing all claims capable of proof, and the word “debt” in the predicate is used in a more limited technical sense in which “debt” is not synonymous with “demand” and “claim.”

This double signification of the word “debt” in the definition sentence becomes important when it is considered in connection with the words of Section 63 of the Act. This Section (63) is entitled “Debts which may be proved.” The word “debts” in the title obviously means debts in the broad sense including all “debts,” “demands,” and “claims” provable in bankruptcy in the same sense as the word “debts” as used in Section 1, Subdivision 11.

Sub-section a of Section 63 also relates to “debts” and contains an enumeration of liabilities which are debts in the more restricted sense of liquidated demands. This sub-section (a), as we have heretofore shown, contains not only an enumeration of “debts” but makes it plain that such “debts” as

are enumerated may be *proved and allowed*. Section 63a is therefore something other than an enumeration of certain liabilities which may be proved in bankruptcy; it is an enumeration of liabilities which may be proved and allowed without further formality because they are debts in a restricted legal sense which do not need to be liquidated as distinguished from other liabilities which must first be liquidated by the Court, and may thereafter be proved and allowed.

Section 63b of the Bankruptcy Act relates to the latter class of liabilities, or unliquidated claims. The word "claims" in sub-section b is used in a sense distinct from that in which the word "debt" is employed in Section 63a because "debts" may be proved and allowed while "unliquidated claims" must first be liquidated and thereafter proved and allowed. It seems, therefore, to follow that in the title of Section 63a the word "debts" is used in the same sense as in the subject of the definition sentence Section 1(11) and the word "debts" in Section 63a and the word "claims" in 63b are used in the same sense as those words are used in the predicate of the definition sentence Section 1 (11). The emphasis which we have placed on the definition of the words "debts" and "debt" in Section 1, Subdivision 11 in their relation to the words "debts" and "claims" as used in Section 63, we believe to be justified by a comparison of the two sections, because we believe that Congress intended the definition to apply to the Section (63) which particularly deals with provable debts, as otherwise the definition sentence considered alone would be contradictory and meaningless, but considered in connection with Section 63 acquires a real and important significance.

Section 63 of the Bankruptcy Act when read with Section 17, and with other Sections of the Bankruptcy Act plainly indicates that Congress intended that tort claims should be provable.

This Court has held in *Crawford vs. Burke*, 195 U. S., 193, that in arriving at the proper construction of Section 3 of the Bankruptcy Act it must be read in connection with 17 of that Act. When Section 63 and Section 17, as amended in 1903, are read together, it becomes quite evident that tort claims are both provable and dischargeable. The enumeration of tort claims in Section 17 was considerably augmented by the amendment of 1903 and the only reasonable conclusion to be drawn from the inclusion by the amendment of certain liabilities for torts involving wrongful intent and moral turpitude is that Congress had clearly in mind that by the original enactment tort claims, even those embracing wrongful intent and moral turpitude, were provable and dischargeable.

Section 17 of the Bankruptcy Act before its amendment in 1903 provided as follows:

"Section 17. Debts not affected by a discharge. a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for

proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Even before the amendment of 1903, Section 17 saved from discharge debts of the bankrupt which "created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

In *Crawford vs. Burke*, *supra*, in interpreting this section, the United States Supreme Court said, 195 U. S., at page 193,

"If no fraud could be made the basis of a provable debt, why were certain frauds excepted from the operation of a discharge."

It is clear from the opinion of the Supreme Court that it could not escape the conclusion that by excepting fraud claims from the operation of a discharge, the Bankruptcy Act recognized that such claims were provable, when Sections 63a and 63b and Section 17 were considered in relation to each other.

Crawford vs. Burke was decided under the provisions of the Bankruptcy Act as it existed before the Amendment of 1903.

In January, 1903, Section 17 was amended to read as follows:

"Section 17. *Debts not affected by a discharge.*—a. A discharge in bankruptcy shall

release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

It will be noticed in the enumeration of debts which are exempted from a discharge contained in Section 17 after the amendment of 1903 that practically all are liabilities for torts. If tort claims, including the claims enumerated in Section 17, were not provable claims, they would not be discharged, and if they were not discharged because they were not provable, there was no reason for exempting them from discharge. The mere recitation of these tort claims in Section 17 indicates that Congress believed that the claims therein enumerated were provable claims, and this conclusion is fortified by the reports of the Congressional Committee. We quote from the report which will be found in the Miscellaneous Documents of the

57th Congress, First Session, House Reports No. 6, being Report No. 1698. Referring to the proposed amendment to Section 17, the report says:

"The next amendment provides that liabilities for frauds, etc., as described in the act shall not be released by the discharge. As the law now is these liabilities must have been reduced to judgment or else the bankrupt is discharged. This amendment is in the interest of justice and honest dealing and honest conduct. This amendment further provides that a discharge in bankruptcy shall not release the bankrupt for alimony due or to become due to his wife, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation. It seems to the committee, and this is the universal sentiment, that the bankrupt ought not to be discharged from liabilities of this description."

It is evident that Congress believed that the various classes of torts enumerated in Section 17 as amended which were not enumerated in the original section were dischargeable in bankruptcy, and therefore provable. The Committee's report says, as to claims for fraud, etc.:

"As the law now is, these liabilities must have been reduced to judgment or else the bankrupt is discharged."

If claims for fraud generally were not provable, they would not have been discharged. The concluding sentence also throws light on the under-

standing of the Committee, for in speaking of alimony due or to become due and of seduction and criminal conversation, they state that the bankrupt ought not to be discharged from *liabilities* of this description.

The detailed analysis of the bill accompanying the report affords additional evidence that the Congressional Committee believed that all the liabilities enumerated in Section 17 were provable debts. They state:

"Section 6. The charges in Section 17 of the law are to settle questions arising from antagonistic decisions of the court and to exclude beyond peradventure certain liabilities growing out of offenses against good morals from the effect of a discharge. (Compare a similar amendment to the English act of 1883 by Section 10 of the amendatory act of 1890.)

"The substitution of 'liabilities' for 'judgments in actions' makes the clause broader. Now claims created by fraud but not reduced to judgment are discharged. Neither the claim nor the judgment should be. (Compare *In re Rhutassel* [Iowa], 96 Fed., 597, with *in re Lewenson* [N. Y.], 99 Fed., 73.)"

It is to be noted that the Committee believed and expressly stated that

"Now claims created by fraud but not reduced to judgment are discharged. Neither the claim nor the judgment should be."

Claims created by fraud would, of course, not have been discharged unless they were provable

debts, and the recognition that they would be discharged is a recognition that they are provable debts.

The amendment of Section 17 of the Bankruptcy Act in 1903 constituted a legislative construction of the Act that tort claims were provable.

It is well settled that a statute is capable of legislative as well as judicial construction and that legislative construction by amendment of a statute is persuasive upon the courts.

Tiger vs. Western Investment Company, 221 U. S., page 286, at page 308, where this Court said:

"The construction contended for by the defendant-in-error places Congress in the attitude of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passage of the Act of 1906 and the expiration of the period named in the Act of 1902 with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress at least, restrictions still existed so far as the inherited lands of full-blooded Indians were concerned."

Baker vs. Swigart, 199 Fed., 865,

"The first thing to do in such a case is to see just what the law making power has enacted. If the provisions of the statute are plain and un-

ambiguous, the Courts must accept the law as there declared; otherwise, they would usurp the function of the legislative department of the government. Of course, if the provisions of the statute in question be uncertain, conflicting or ambiguous, they become the proper subject for construction which is a function of the Court, in which event, and in aid thereof, resort may be had to any construction put upon it by any subsequent act of the same legislative body, if such there be * * *."

If the statute is ambiguous, the Court should adopt such a construction of Section 17 as will make it harmonious with Section 1 (11) and Sections 63a and b, and the sections can only be harmonized by holding that tort claims are provable.

The cardinal rule of statutory construction is that all the words of a statute should be read together to determine its meaning. If the several sections of the statute relating to a particular subject, when read together, are harmonious, there is no room for construction by the Courts, and irrespective of what they may consider the best policy to be, they must give effect to the statute.

Thornley vs. United States, 113 U. S., 310, at page 313.

Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1, at page 33.

"It is the duty of courts of justice so to construe all statutes as to give full effect to all the words in their ordinary sense, if this can

properly be done; and thus to preserve the harmony of all the provisions."

Bend vs. Hoyt, 13 Peters, 263, at page 272.

"It is the duty of the Court to give effect, if possible, to every word and clause of the statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed."

Montclair vs. Ramsdell, 107 U. S., page 147, at page 152.

It is also a settled rule of statutory construction that "prior acts may be resorted to, to *solve* but not to *create* an ambiguity."

This proposition was stated in terms by the United States Supreme Court in *Hamilton vs. Rathbone*, 175 U. S., 414, at page 421.

We believe that all the Courts which have decided that tort claims are not provable under the Act of 1898 have proceeded upon the erroneous assumption that the Act of 1898, although it differed radically from the prior statute of 1867 in its wording and structure, must be made to conform to the older statute, and after a consideration of the words of the statute in order to justify the conclusion reached, have been obliged to admit, either expressly or by implication, that in Section 17 as amended in 1903, Congress used the word "liabilities" inadvisedly, in order to sustain their construction, and counsel for the trustees was forced to take this position in his brief and on the argument in the Court below.

In other words, the Courts deciding that tort claims are not provable under 63b have first determined, independently of the statute, that Congress did not intend that tort claims should be provable and that it therefore followed that Section 63b added nothing to the claims enumerated in Section 63a. Having thus successfully disposed of Section 63b, they then proceeded to consider Section 17 as amended and here met with some difficulty. They then applied the rule of construction that in case of conflict in the provisions of a statute, the section or provisions specifically dealing with the subject will prevail over inconsistent, even if related, sections or provisions. But this subordinate rule of construction is not applicable in relation to Sections 63a, 63b and Section 17, because it can only be here applied by departing from the primary rule of construction that all the words and provisions of a statute must be first considered together and harmonized, if possible, and that only in case they cannot be made to harmonize the subordinate rule of construction above mentioned will be applied. We think that there is no legitimate reason why Section 63b should be stricken down and the natural and normal meaning of its words disregarded for the purpose of *raising* an inconsistency between Section 63 (with "b" eliminated by judicial construction) and Section 17, solely for the purpose of justifying the preconceived idea that Congress did not intend that tort claims not reduced to judgment should be admitted to proof. Following this line of argument of the cases holding that tort claims are not provable, it becomes apparent that it is a very clear il-

illustration of the logical fallacy known as reasoning in a circle.

Such cases as *Brown & Adams vs. United Button Co.*, 149 Fed., 48, therefore violate two of the rules of statutory construction which are enunciated above. They create an ambiguity by resorting to prior acts of Congress and depart from the rule that all the words of a statute relating to the subject should, if possible, be harmonized.

A construction which denies tort creditors the right to prove in bankruptcy and denies the bankrupt a discharge from tort claims is inequitable and unjust and if the statute is ambiguous, should be avoided by the Court.

Knowlton vs. Moore, 178 U. S., 41 at page 65.

Unless the statute of 1898 is so plain as imperatively to demand such a construction, it is difficult to see any good reason why a judgment for a tort should be provable and the tort itself, when not reduced to judgment, should not be provable; nor why a tort claim should be admitted to proof or be denied proof solely because of the accident that the claimant has been able to put his claim in judgment before bankruptcy; or why, if his claim is in judgment at the time of the bankruptcy and the trustee, because of some error in the record, prosecutes an appeal and the judgment is reversed, it is too late, after the creditor has obtained another judgment in the same suit, for him to participate in the distribution of property with the other creditors.

It is of course plain that if a tort claim has been reduced to judgment before bankruptcy, no good

purpose would be served by a re-examination of the merits of the claim in bankruptcy proceedings. This justifies putting judgments in a class of claims which may be proved and allowed without liquidation and this is all that it justifies.

Claims for pure torts after liquidation subsequent to the bankruptcy should have the same validity as claims reduced to judgment before the bankruptcy. But because they are unliquidated, it is necessary that proceedings for their liquidation should be taken before they are admitted to proof. This justifies deferring their proof and allowance until such liquidation has been had, but it does not justify an exclusion of the claim from proof.

The injustice of denying a tort creditor the right to prove his claim in bankruptcy is most pronounced in the case of tort claims against corporations and is not in any way alleviated by the fact that if a claim is not provable it is not discharged, because corporations rarely, if ever, apply for a discharge. When it is remembered what a large portion of the commercial and industrial activities of the country are directed through the agency of corporations and how in large industrial enterprises injuries to persons and property are regarded as an expense of the business which is included in the contract price and even insured against, it is difficult to understand why if a narrow construction of the statute will defeat proof and a liberal construction will admit proof, the liberal construction should not be followed. It may be noted in this connection that claims for negligence and other tort claims against corporations which cannot avail themselves of the bankruptcy statutes, as railroads,

etc., whose insolvent estates are administered in courts of equity, may be reduced to judgment after the filing of the bill and the appointment of a receiver and may afterwards participate in the distribution of the insolvent estate with contract creditors.

Pennsylvania Steel Co. vs. New York City Ry. Co., 165 Fed., 459;
Veatch vs. American Loan & Trust Co., 79 Fed., 471;
Atchison T. & S. F. vs. Osborn, 148 Fed., 606.

If tort claims in general are not provable and therefore not dischargeable under the provisions of the statute, further instances of the imperfect workings of the statute, and in fact, the failure of its purpose, are presented. If, as stated by the United States Supreme Court in *Chicago Auditorium Assn. vs. Central Trust Company*, 240 U. S., 581,

"it is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt and to leave the honest debtor thereafter free from liability upon previous obligations,"

how can an honest debtor, who has innocently incurred liability for injury to the person or property of another, ever start afresh unless the Bankruptcy Act makes such liabilities provable and dischargeable. Most persons engaged in commerce or industrial pursuits must employ others and are, un-

der the doctrine of *respondiat superior* responsible for the acts of commission and omission of their employees. However free from fault or honest in his intention and prudent in his acts the bankrupt may be, if a claim against him for injury to the person or property of others not reduced to judgment is not provable and dischargeable, the Bankruptcy Act affords him no relief.

In many instances a tort creditor's claim is more meritorious than a claim for breach of contract. The contract creditor has a choice of knowing with whom he deals and electing to place trust and confidence in him. A tort creditor generally has no such election. The Bankruptcy Act, if finally construed to prevent the proof of claims for injury to the person or property of others, would take away a debtor's property from one class of creditors in order to give it to creditors of another class. An insolvent debtor against whom actions resulting from injury to the person or property of others were pending, knowing that bankruptcy was unavoidable and that he could not be discharged from the claims but only from the judgments, would be very seriously inclined to make no defense, whereupon judgment would be taken by default, perhaps for a large amount, and the judgment-creditor upon a judgment thus obtained would share equally with all the other creditors. It might be that the bankrupt had a good defense to the claim for personal injury, or that the damages recovered upon his default were excessive, but if the claim had been reduced to judgment and the time to appeal had expired before the appointment of a trustee, there would be no means of righting the injustice to the other creditors.

If tort claims are not provable, there is lacking in the statute the necessary equilibrium between tort and contract claims to give the Bankruptcy Act a uniform operation. It is well established that it is only a transfer or payment to a creditor having a provable claim which constitutes a preference (*Richardson vs. Shaw*, 209 U. S., 365, at page 381; cf. *Clark vs. Rogers*, 228 U. S., 534). This construction is necessitated by the language of the Bankruptcy Act (Sec. 1, subd. 9; Sec. 60-a).

If tort claims are not provable, an insolvent debtor is justified in surrendering all his property to his tort creditors in satisfaction of their claims and if the value of the money or property received by them is justified by the damages sustained, the transfer or payment cannot thereafter be set aside as a preference even if made on the eve of bankruptcy. After making such a transfer, the insolvent debtor may file a voluntary petition in bankruptcy and receive his discharge and his contract creditors will receive little or nothing.

In many ways this would operate contrary to the spirit of the Bankruptcy Act. It would foster and encourage obtaining liens by legal proceedings on behalf of tort creditors and thereby give judicial sanction to the wild scramble for preferences under state laws which the present Bankruptcy Act, we are told, was enacted to prevent. It would also prevent Section 17, exempting certain debts from discharge, from having its full beneficial operation. Under Section 17, liabilities in actions for wilful and malicious injuries to the person or property of another or for the seduction of an unmarried female, or for criminal conversation are exempted from discharge. The purpose of that exemption is

undoubtedly to punish wrong-doers by refusing them a discharge in bankruptcy from the consequence of their wrongful acts. But it hardly seems possible that it was the intention of the framers of the statute that an insolvent debtor on the eve of bankruptcy might take all his property and apply it to the satisfaction of such liabilities created by his own conscious wrong, and after obtaining releases, avail himself of the Bankruptcy Act to obtain a discharge from his contract indebtedness. This consideration emphasizes the close relationship of Section 17 to Section 63.

It has sometimes been urged that the liquidation of tort claims would be onerous in a bankruptcy proceeding and that the bankruptcy courts are not constituted for the liquidation of such claims. A claim for personal injury or injury to property is no harder to liquidate than a claim for breach of promise of marriage or for unliquidated damages for breach of contract, and the fact that damages for an anticipatory breach of contract might be difficult of liquidation did not deter this Court in *Central Trust Co. vs. Chicago Auditorium Assn.*, 240 U. S., 581, from holding that a claim of that nature was provable.

It may be answered that if the Bankruptcy Act is thus full of anomalies and hardship and injustice in particular instances which prevent it from having the operation intended, i. e., "to permit all creditors to share in the distribution of the assets of the bankrupt and to leave the honest debtor thereafter free from liability upon previous obligations," an appeal should be made to Congress to amend the Statute. But why should the Statute be amended when, adopting the general rule of

statutory construction that all the words in a statute should be construed together and so far as possible the words used should be given their natural, normal meaning, the glaring anomalies are avoided and the sections of the statute constitute a harmonious whole?

The Bankruptcy Act of 1898 marked a departure from the legislative policy of the former bankruptcy laws to meet changed conditions.

All the older bankruptcy statutes were framed with particular reference to traders (Leidigh Carriage Company vs. Stengel, 95 Fed., 637, at pages 646-647; C. C. A. Sixth Circuit per Taft, J.) and the Bankruptcy Act of 1867 assimilated to some extent the characteristics of the older traders' statutes (In re Lachmeyer, Fed. Cas. 7966).

The Bankruptcy Act of 1898, however, has lost the characteristics of a traders' statute. Under the present Act it has been held that claims for breach of promise of marriage are provable (*In re Fife*, 109 Fed., 880; *In re McCauley*, 101 Fed., 223), and in the absence of the element of seduction are dischargeable. Judgments for all kinds of torts, including claims for negligence of the bankrupt or imputed to him, for assault and battery, libel and slander, nuisance, fraud, criminal conversation and seduction are provable (*Tinker vs. Colwell*, 193 U. S., 473; *In re Freche*, 109 Fed., 620). Damages for anticipatory breach of a contract where the contract has not been broken before the bankruptcy and the bankruptcy itself is relied upon as a breach, are provable (*Chicago Auditorium Assn. vs. Central Trust Company*, 240 U. S., 581). The

latter case overruled decisions in many of the circuits and marked a distinct advance in the law.

The courts which have decided that Section 63b does not permit the proof of tort claims have proceeded upon the assumption which we believe to be erroneous that it was not intended by the statute of 1898 to allow proof of claims which would not have been provable under the former Bankruptcy Act of 1867 and "would * * * invoke a wide departure from the settled policy of every system of bankruptcy heretofore enforced in the United States."

(See in re *United Button Co.*, 140 Fed., 495, at page 500.)

These courts and the court below have not taken into consideration the fact that the bankruptcy law of 1898 in its structure and wording, so far as it relates to what claims are provable in bankruptcy, represents such a wide departure from the former law that decisions under it are inapplicable. The period of thirty-one years elapsing between 1867 and 1898 marked a greater change in the commercial and industrial life of the country than any similar period in its history and Congress was indeed unresponsive to the changes which had occurred since the repeal of the former bankruptcy act if it did not write into the statute the necessary provisions to meet the growing needs of the commercial and industrial world existing at the time of its adoption.

To summarize:

I. Sections 1 (11), 17 and Sections 63a and b of the Bankruptcy Act of 1898, when read together, are plain and unambiguous and permit the proof of tort claims in bankruptcy.

II. If Sections 1 (11), 17 and Sections 63a and b be regarded as ambiguous, applying the recognized rules of statutory construction, the ambiguity should be resolved in favor of the provability of tort claims:

(a) To give full effect to all the words of those sections.

(b) To comply with the rule of *noscitur a sociis*.

(c) To give effect to the rule that the legislative construction placed upon a statute is binding upon the courts.

(d) To give a construction to the statute conformable to equality and justice:

1. By admitting tort claims as well as contract claims to proof and thereby preventing the injustice of taking away the bankrupt's estate from tort creditors who have not reduced their claims to judgment and giving it to contract creditors.

2. By giving tort creditors of corporations a right to participate in the distribution of the corporation's bankrupt estate which would otherwise be completely extinguished and all rights of future recovery lost.

3. To give full effect to the purpose of the Act which has been declared by the Supreme Court to be "to permit all creditors to share in the distribution of the assets of the bankrupt and to leave the honest debtor thereafter free from liability upon previous obligations."

II.

The appellants' claim is a provable claim in any event, because the fraudulent representations of the bankrupts made them liable as for money had and received to the claimant's use.

It is well settled that moneys obtained by fraud may be recovered in an action for money had and received. One of the early cases on this point in this court is *Catts vs. Phalen et al.*, 2 How., 376. The plaintiffs were conducting a lottery. They employed the defendant to perform the manual operation of drawing the lottery tickets from the lottery wheel. Defendant conspired with one Hill to purchase lottery tickets from the plaintiffs and fraudulently contrived that the lottery numbers drawn should bear the same numbers as the lottery tickets purchased by Hill. This court held that because of the fraud the defendant was liable in an action for money had and received, for the money which was paid by the plaintiffs to Hill and in turn paid to the defendant because of plaintiffs' belief that the numbers drawn from the lottery wheel had been fairly and honestly drawn and corresponded with the numbers upon the tickets purchased by Hill.

Burton vs. Driggs, 20 Wallace, 125. The defendant by the production of a sealed instrument containing a false recital induced the plaintiff to purchase a certain claim from him. The court held that because of the false representations made, the plaintiff could recover from the defendant in as-

sumpsit the amount obtained by false representations.

Stanhope vs. Scafford, 77 Iowa, page 594. The defendant sold to the plaintiff 320 acres of land and made certain representations as to its quality, stating it to be worth the price paid for it. These representations were false and fraudulent. The land, instead of being worth \$2240, the purchase price, was really worth no more than \$640. The plaintiff sued to recover the difference of \$1600 and judgment was allowed in his favor in the sum of \$1551.36. On appeal the question was raised whether or not the facts would sustain a recovery upon an implied promise by the defendant to pay the loss suffered by the plaintiff. The court said:

"Counsel for defendants insist that the claim or cause of action upon which plaintiff's suit is based is not a debt due for property obtained by false pretenses. We understand that the motion is based upon this position. The petition alleges false representations and pretenses, inducing a purchase by him for twenty-two hundred and forty dollars of property really worth no more than six hundred and forty dollars. Plaintiff thus sustained loss and damage to the extent of sixteen hundred dollars if he should retain the property purchased, as he is, by the law, authorized to do.

"Under familiar rules of the law which will be recognized by the profession without the citation of authorities, defendants, having received pecuniary advantage from the misrepresentations and false pretenses, are liable in a civil action as for a debt; the plaintiff being

authorized to waive the right of proceeding as for a tort, and to sue for the loss and damage he sustained. The defendants in that case are liable for such loss and damage, and their liability is a debt arising on the implied promise which the law raises that they will pay the loss suffered by plaintiff. See *Warner vs. Cammack*, 37 Iowa, 642, and *McDole vs. Purdy*, 23 Iowa, 277. The debt to recover for which this action is brought 'is due for property obtained under false pretenses.' Code, section 2951, par. 12. The attachment was therefore rightly issued, and should not have been dissolved. These considerations dispose of all questions in the case."

First State Bank vs. McGaughey, 86 Southwestern, 55. The defendant sent a telegram to the plaintiff asking "Will you pay C. W. Clark's checks for cattle?" On the same day the plaintiff replied by telegram "Yes." Thereupon C. W. Clark drew a sight draft on appellant for \$8500, payable to the order of the defendant, which was paid by plaintiff in due course of business, plaintiff receiving the amount of the draft on or about the day of its date. Suit was brought by plaintiff against the defendant to recover \$1650 of the sum so paid, the petition alleging "that in principle and in effect only \$7200 of said draft given by said Clark to defendant as aforesaid was for cattle and the balance of said draft, to wit, \$1650, was not for cattle but was for some other purpose unknown to plaintiff." It was held that on the facts above stated the defendant was liable to plaintiff in a suit for money had and received. The court said:

"Considering, then, on its merits, the question raised by the appeal, and indulging every reasonable intendment in favor of the petition, we have the case of money paid A by B, at the request of C, in excess of the amount B had promised or was under obligations to pay, the excess having been paid by B in the mistaken belief that he had promised and was under obligation to pay the full amount, whereas A received the money knowing that B had not promised to pay the amount so received. In such cases the law would imply a promise on A's part to pay the excess back to B. It is, perhaps, needless to say that in this illustration A represents appellee and B appellant."

We think that these cases clearly establish that in addition to Muller, Schall & Company's claim for damages for the false representations made by the bankrupts, they also have a claim against the bankrupts to recover the amount by which they were unjustly enriched by the fraud, and that under the authorities above cited the law implies a promise to repay the money so obtained by fraud. This implied promise brings the case within Section 63a of the Bankruptcy Act and makes the claim a provable claim.

III.

The liability of Albert Lemoire and Ed. E. Carriere for obtaining moneys by false representations was several, and it is immaterial whether the claims are presented as claims in tort for fraud or as claims upon an implied or quasi contract to restore the moneys fraudulently obtained.

Members of a partnership are severally (as well as jointly) liable for frauds practised in connection with the conduct of the firm business.

22 *Am. & Eng. Encyc. of Law*, page 171.

"The liability of partners for loss occasioned by any wrongful act or omission, or for the misapplication of money or property for which the firm is liable, is, as a general rule, joint and several, as is also their liability for any breach of trust imputable to the firm," citing many cases.

Lindley on Partnership (8th Ed.), page 821.

"Breaches of trust and frauds imputable to a firm place the *cestuis que trustent* and defrauded creditors in the position of joint and several creditors."

It follows that where the liability of partners is several, whether arising out of contract or not, separate proofs of claim in bankruptcy may be

made against the individual estates of the partners and dividends allowed from those estates.

Black on Bankruptcy, Sec. 129.

In re McCoy, 150 Fed., 106.

In re Coe, 169 Fed., 1002; aff'd 183 Fed., 745.

In re Blackford, 35 App. Div., 330.

In re Baxter, 18 N. B. R., 62 (Fed. Cas. No. 1119).

In re Jordan, 2 Fed., 319.

In re Parkers, 19 Q. B. Div., 84.

Blyth vs. Fladgate, L. R., 1 Ch. Div. (1891), 337.

In re McCoy, 150 Fed., 106 (C. C. A., 7th Circuit), was a case where promissory notes were signed by a firm and by the individual partners, the proceeds of the transaction going into the partnership business. It was claimed that the transaction was a partnership transaction, and that proof could only be allowed from the partnership estate and not from the individual estates. The Court held, however, that claims might be proved against the individual estates, as well as against the partnership estate.

An appeal was taken to the United States Supreme Court, but the appeal was dismissed (*Chapman vs. Bowen*, 207 U. S., 89), and this Court, in passing upon the decision of the court below, said:

"The decision below proceeded on well settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act."

In *In re Coe*, 169 Fed., 1002 (affirmed 183 Fed., 745). Certain ostrich feathers covered by trust receipts securing the payment of acceptances drawn against the shipments of feathers had been converted by the co-partnership of Cadenas & Coe. The firm offered a composition and the creditor received and accepted the composition dividend. It afterwards proved its claim against the separate estate of Coe (one of the partners) and although it did not appear that Coe had personally profited by the conversion of the feathers or that he had personally participated in the conversion, the claim was allowed against his separate estate. The District Court held that the members of the firm were jointly liable upon acceptances and were jointly and severally liable in tort or quasi contract for the conversion.

On appeal to the Circuit Court of Appeals, Second Circuit, that Court in affirming the order, 183 Fed., 745, said at page 747:

"The bank could prove two claims, one against the firm, i. e., the partners jointly on the acceptances, and the other against the partners jointly and severally upon an implied contract (the tort being waived) to repay moneys of the bank wrongfully converted by them. The doctrine of election between inconsistent remedies on the same claim has no application."

These decisions announce no new rule of law, but followed many carefully considered decisions, both in the United States and England.

Re Pierson, 19 App. Div. (N. Y.), 478-483. Stock brokers held certain stocks in pledge and

converted them by an unlawful pledge. The owner obtained the proceeds of such stocks as remained and then presented his claim against the executor of a deceased partner "as an individual indebtedness of such deceased member, arising out of his tortious act in the pledging of their stocks." The decedent's estate was insolvent but the Court nevertheless held that it was individually liable for the conversion committed by the partners, and that the claim based on the conversion must share in dividends equally with the individual creditors.

City Bank vs. Park Bank, 32 Hun (N. Y.), 105, was a case of "joint conspiracy to defraud," by which the wrongdoers realized money, and the Court held that the injured party might "waive the tort and proceed upon the implied contract to repay the money obtained by the fraud" and that this quasi contract liability could be set up as a counterclaim against one of the wrongdoers suing alone.

"We think the implied contract in such case which arises upon waiver of an action for tort is joint and several and not joint alone. Such was the nature of the tort and each party could have been separately sued upon his implied promise and be made to answer for the whole of the money obtained by the fraud consummated under the conspiracy."

Terry vs. Munger, 121 N. Y., 161, 171.

Re Blackford, 35 App. Div., 330.

Loveland on Bankruptcy, 315 and cases cited.

Lindley on Partnership, 8th Ed.,* 821,
says:

"Breaches of trust and frauds imputable to a firm, place the *cestui que trustent* and defrauded creditors in the position of joint and several creditors," citing many cases.

Russell vs. McCall, 141 N. Y., 437, was a case of misappropriation by partners, one of whom died, and the court of equity held the survivor individually liable to restore the amount misappropriated, holding on full argument that this implied contract obligation to make restitution was a joint and several obligation upon which proceedings might be taken (and in the case in question actually were taken) against each partner separately.

Liquidators vs. Coleman, L. R., 6 Eng. & Irish Appeal Cases, 189, was a case where the guilty members of a partnership had wrongfully received moneys which in law belonged to a corporation of which he was a director and without the knowledge of his partner, who claimed to be entirely ignorant and innocent, placed these moneys in the firm account. The House of Lords held that the *innocent* partner, as well as the guilty partner, was liable.

"C had a partner K who was not in any way connected with the association; the transaction, however, had been a partnership transaction; *held* that the partners were liable jointly and severally to make good to the association any profits which it ought to have received in the increased amount of the commission."

In *Sadler vs. Lee*, 6 Beavan, 324, the Court allowed separate proof in a waiver of tort case against the innocent partner's estate.

Re Vetterlein, 20 Fed., 109 (Southern District of New York). Here the United States was allowed to prove against each separate estate and also against the firm estate, its claim for forfeiture because of fraudulent undervaluations. Judge Brown says: "Claims of the kind here referred to are both joint and several."

Loveland on Bankruptcy, 315, says, that separate and simultaneous proofs against the firm and the individual partner may be made and double dividends received in various cases of wrongful use of trust funds, misappropriation, etc.

Lindley on Partnership, 8th Edition, 821, says: "Breach of trust and frauds imputable to a firm, place the *cestui que trustent* and defrauded creditors in the position of joint and several creditors."

Re Blackford, 35 App. Div., (N. Y.), 330, Cullen, J., writing. A judgment was entered against a partnership for a tort, wrongful taking and detention of property, and the firm became insolvent. The Court held that notwithstanding the joint judgment and notwithstanding the rule of marshaling, which holds that the firm assets shall be primarily for firm creditors and the separate assets for separate creditors, the judgment might be proved against the individual estate of one partner *pari passu* with the individual creditors. Judge Cullen says that though the judgment "arose out of partnership transactions, the liability of the partners was joint and several," and not merely joint or several, and that the case is the same as if the partner has individually pledged his property or responsibility for a firm debt, and concludes as follows:

"In this State where a liability is both joint and several, the creditor has the right to enforce both liabilities. * * * Nor do we see that the liability of joint tort-feasors is different from that of parties to a contract by which under its express terms they become jointly and severally bound. The principle on which equity founds the rule that joint creditors must look to the joint estate and individual creditors to the separate estate of the partners, is that the joint creditors have extended credit on the faith of the firm property and the individual creditors on the faith of the separate estates of the partners. This reasoning certainly does not obtain in a case like the present in which there was no contractual relation between the parties and the act of the defendant was a tort pure and simple."

The partner whose estate was held did not personally participate in the wrong.

Re Baxter, 18 National Bankruptcy Register Reports, 62, held that double proof against the firm and the individual estate was proper where corporate moneys had been wrongfully used in the business of the firm.

Re Tesson, 9 National Bankruptcy Register Reports, 378, where the Court held that double proof might be made against the joint and separate estate and double dividends allowed, for trust funds were wrongfully put in the partnership business.

Re Jordan, 2 Fed., 319, where the claimant's moneys were wrongfully put into the firm business and used, and the Court held that double proof should be made against the individual estate and the joint estate and double dividends allowed, say-

ing, after full discussion and citation of many cases:

"By the entries upon the firm books of the various sums thus paid to the firm, his co-partner, Blake, became cognizant of the transactions, and the firm thereby became chargeable as trustees for the amount thus loaned to the firm by Jordan as administrator. In England there is a uniform current of authorities that when trust funds are thus misappropriated and loaned by an executor or trustee, under a will, to a firm, with the sanction of its members, this amount constitutes a joint and several claim, provable against the firm and the individual members of the firm who have knowledge of the transaction. * * * No such question of election can here arise, as our bankrupt act and the decisions of the courts here allow of double proof in cases where a joint and several liability exists."

Re Parkers, 19 Queen's Bench Div., 84, was a case of improper use of funds and the court allowed double proof against the firm estate and the individual estate in bankruptcy.

The subject is very well summed up in *Black on Bankruptcy*, §129, as follows:

"There are some instances in which a creditor will be entitled to prove his claim against both the bankrupt partnership and the several members of the firm, and to receive dividends from both sources until satisfaction. Thus, a creditor who holds commercial paper made by the bankrupt firm and indorsed by an in-

dividual member of the firm, also a bankrupt, may prove his debt against both estates and share in the dividends of each. For he would have a right of action against each, though entitled to only one satisfaction. * * *

But generally speaking, a joint and several obligation given by a partnership is also provable as an individual obligation against the estate of either of the parties. A joint and several note, given for money borrowed by a firm and signed in the firm name, with other names following, may be proved against the joint assets of the firm; but not one which is signed individually by certain of the partners and by others as sureties. On similar principles, where one member of a firm, with the knowledge and assent of his co-partners, misappropriates trust funds (as, the money of an estate of which he is executor, or the money of a corporation of which he is the treasurer or agent) and invests the same in the business of the firm, the obligation thus created is both joint and several; and proof of the claim may be made against the partnership as well as against the individual partner. A parallel rule applies to the case of a liability to the United States, incurred by a fraudulent valuation of goods entered at the custom house; the claim of the government against the firm for the tort is joint and several and may be proved against both estates. And in general, and notwithstanding some vigorous dissent, the rule may be said to be fairly well established that the commission of a tort by a partnership makes the partners also jointly

and severally liable, and the party injured may prove his claim both against the estate of the firm in bankruptcy and against the separate estates of the partners."

Opposed to this array of authorities is the case of *Reynolds vs. New York Trust Co.*, 188 Fed., 611 (C. C. A., 1st Circuit). This case is contrary to the Coe case, *supra*, 169 Fed., 1002 (affirmed 183 Fed., 745), only in so far as it holds that a liability for conversion by a firm cannot be proved against the firm and also against the individual members of the firm. This point was not raised in the Coe case because proof was there made on an express contract against the firm and in quasi contract against one of the members of the firm; but the grounds of the decision in the Coe case are broad enough to raise a direct issue with the decision in the Reynolds case.

In *Reynolds vs. New York Trust Company*, *supra*, it appeared that the firm of E. H. Gay & Company had made a tortious conversion of certain bonds of the creditor, the New York Trust Company, which they had held as bailees. E. H. Gay & Company were subsequently adjudicated bankrupts. The New York Trust Company presented a claim against the partnership alleging a delivery of the bonds and its failure to redeliver. It also presented a claim against the individual estate of E. H. Gay. Both the claim against the firm and the claim against the individual were proved on the theory of implied contract based on conversion of the bonds, it being admitted that a claim against the firm on an express contract to redeliver the bonds would have been inconsistent with a claim against

either the firm or the individual upon an implied or quasi contract based upon the conversion of the bonds (see page 617). The matter was brought before the Court upon stipulated facts among which was the statement that "no attempt is made to show that the unauthorized pledge was the individual act of E. H. Gay."

The Court held that a separate claim against the individual estate of E. H. Gay could not be proved; that although it is said that the members of a partnership are jointly and severally liable for torts committed in prosecution of the partnership business, in reality the liability is joint or several and that making the proofs on implied or quasi contract did not change their nature in this respect; that the creditor having made proof against the partnership had evidenced an election to hold the partners jointly, and not severally, liable in quasi contract and because of such election a claim against the individual estate could not be made. It will be seen that the decision in *Reynolds vs. New York Trust Company* proceeds altogether upon the doctrine of election, although there is an intimation that if E. H. Gay, the individual partner, had actively personally participated in the conversion of the bonds, a different result might have been reached.

The conclusion reached by the Court in *Reynolds vs. New York Trust Co.*, *supra*, seems to be the same conclusion reached by the early English cases which held that where the members of a firm were jointly and severally liable for an indebtedness the creditor was put to his election to prove either against the firm assets or against the individual assets of the partners. This old English

rule is stated in *Story on Partnership*, 6th Edition, Section 384, and is severely criticized by the learned author in Sections 385 and 386. Justice Story contends that if the creditor had joint and several rights at law he should be permitted to make joint and several proofs in bankruptcy.

The English rule, apparently accepted by the Court in the Reynolds case, was repudiated by several decisions in the Federal Courts where the question was examined and considered with care.

In re Farnum, 6 Law Rep., 21 (Fed. Case No. 4674).

In re Bigelow, 3 Ben., 198 (Fed. Case No. 1398).

Mead vs. National Bank of Fayetteville, 6 Blatch., 180 (Fed. Case No. 9336).

Emory vs. Canal National Bank, 3 Cliff., 507 (Fed. Case No. 4446).

In re Bradley, 2 Biss., 515 (Fed. Case No. 1772).

IV.

The claims filed against the individual partners are individual claims binding upon their individual estates and not partnership claims binding only upon the partnership estate.

A brief perusal of the record clearly indicates that the claims proved against the individual members of the firm are claims based upon their own culpable conscious implication in the frauds described in the proof of claim.

The allegations contained in the proofs of claim filed against the estates of the individual partners (Record, pages 14 to 21, 22 to 29) allege that LeMore and Carriere were engaged in an unprofitable business largely based upon misrepresentation; that in the prosecution of that business, they presented to the claimants herein false statements in writing as to their assets and liabilities, and that on the strength of these representations, the claimants purchased drafts of A. LeMore & Company which had annexed to them spurious bills of lading, all of which the individual partners well knew.

So far as these proofs of claim were uncontradicted, they are *prima facie* evidence of all the facts set forth therein. (*Whitney vs. Dresser*, 200 U. S., 532; *Board of Commerce vs. Security Trust Co.*, 225 Fed., 454; *In re Elk Valley Coal Mining Co.*, 210 Fed., 386; *Moore vs. Crandall*, 205 Fed., 689; *In re Dunlap Carpet Co.*, 206 Fed., 726.)

The only testimony introduced for the purpose of contradicting the facts set forth in the proof of claim was to the effect that at the time the drafts were sold to the claimants Muller, Schall & Company, Edward E. Carriere, was in New Orleans, and Albert LeMore was in Paris, and that the drafts were sold to Muller, Schall & Company by one Trippe, LeMore's agent in New York; that Trippe was in correspondence with the firm in New Orleans (Record, pages 38 to 40). When Mr. Carriere, who appeared as a witness for the Trustee (Record, pages 35 to 36), was sought to be cross-examined by counsel for the claimants as to the false statements referred to in the proofs of claim, he said:

"I don't think that I should answer any question as to any statements sent by the firm of A. LeMore & Company in view of the fact that I am now under indictment in the Federal Court."

There was no evidence given on the hearing to indicate that LeMore and Carriere did not plan and direct the frauds. We think there is enough evidence in the record to show that the sending of the false statements from New Orleans to New York through the mails constituted an offence against the United States, to wit, the use of the United States mails to defraud. If LeMore and Carriere were convicted of the offence for which they were indicted, they would, of course, be convicted as individuals and not as a partnership, and it seems to us that in a case where the partners are individually criminally liable for frauds, it can not be said that their civil liability is not also individual.

The opinion of the Circuit Court of Appeals seems to indicate that if one of the partners had come to New York and sold the drafts, his estate might be individually liable, but that since the drafts were sold through the instrumentality of an agent (even at the express direction of the two members of the firm) there is no individual liability. The statement in this proposition as a matter of law, it seems to us, emphasizes its unsoundness.

If the drafts described in the proof of claim had been sold to Muller, Schall & Company by someone other than A. LeMore & Company, acting through their agent, and the seller had presented to Muller, Schall & Company a statement of the assets and

liabilities of A. LeMore & Company which was false, Muller, Schall & Company would have had recourse against the seller in an action for breach of warranty if the representation was honestly made, or for fraud and deceit if it was dishonestly made, and there seems to be no question but that if Muller, Schall & Company had obtained the individual endorsements of the members of the firm of A. LeMore & Company, the individual members of the firm so endorsing would have been liable upon the drafts, as would also the partnership estate.

In re McCoy, 150 Fed., 106 (appeal dismissed, sub. nom. *Chapman vs. Bowen*, 207 U. S., 89).

But when Muller, Schall & Company relied on the statement of financial condition of A. LeMore & Company presented to them, and purchased the drafts and parted with their money, they obtained in legal effect rights similar to those which they would have obtained had the individual partners endorsed, to wit, a several claim against each partner for the damages sustained by reason of the false representations. The false statement presented to Muller, Schall & Company took the place of the endorsement of the individual members of the firm or the endorsement of third persons having recognized financial standing. There is no more reason why the individual estates of the partners should not be liable for the damages caused by the false representations than there is that a third person making such misrepresentation should be so liable. Muller, Schall & Company parted

with their money under circumstances giving them rights of action on the contract against the partnership and rights of action for fraud and deceit in tort or quasi contract against the individual members of the firm. The rights of action against the partners were their personal individual liabilities and were as personal and individual as if they had made the representations regarding the drafts of some other firm and not their own. There is no inconsistency in the claim in contract on the drafts and the claim for fraud by reason of the false representations, and the creditor was not put to an election. Precisely the same state of facts was presented in *Friend vs. Talcott*, 228 U. S., 27, and it was held in a carefully considered opinion by Chief Justice White that the creditor by proving his claim in contract and taking a composition dividend did not thereby waive his claim to sue for damages for the fraud.

Accordingly all the claims filed herein by Muller, Schall & Company should be allowed to be proved.

V.

No application of the principles of marshaling or of Section 5 of the Bankruptcy Act operate to prevent the proof and allowance of the claims against the estates of the separate partners.

The Circuit Court of Appeals, in affirming the order of the District Court, placed its sole reliance upon the decisions of this court in two cases. (*Mil-*

ler vs. New Orleans Fertilizer Co., 211 U. S., 496 and *Farmers Bank vs. Ridge Avenue Bank*, 240 U. S., 498.) Both of these cases deal with questions of marshaling purely, and in each case the point decided and the matters discussed by the court in its opinion was confined to the narrow point involved.

In the case of *Miller vs. New Orleans Fertilizer Company*, this Court held that the provisions of the Bankruptcy Act with respect to marshaling assets between firm and individual creditors would prevail over inconsistent provisions of the Louisiana Code, whereby firm creditors participated on an equal footing with individual creditors in the distribution of the individual estate of the bankrupt partners.

Farmers Bank vs. Ridge Avenue Bank, 240 U. S., 498, decided that where a partnership is insolvent and each individual partner is also insolvent and the only fund for distribution is produced by the individual estate of one member, the individual creditors of that member are entitled to priority in the distribution of the fund over the firm creditors. This result was reached by considering that the rule of marshaling set forth in Section 5-f of the Bankruptcy Law is merely an enunciation of the general rule as applied in courts of equity in this country and in England; that the exception to the rule indicated by the English cases, viz., that where there were no firm assets and the only fund for distribution was the assets of an individual member, the firm creditors would participate with the individual creditors in the distribution of the assets of the individual member of the firm,—was based upon a defect in the practice

of the English equity courts, which enforced the principle of marshaling by an order requiring separate accounts; but held that where there were no separate estates, this order could not be made and there was no method of enforcing the rule. This Court pointed out that this defect in practice was provided for by Section 5-g of the Bankruptcy Act which fully met the situation.

Neither of these cases involved any question of double proof and it requires a liberal exercise of the imagination to apply anything in them to the questions involved in the case at bar.

We believe, however, that the decision of the Court in *Farmers Bank vs. Ridge Av. Bank*, *supra*, recognized that the Bankruptcy Act did not change the general equity rule as to marshaling assets of the partnership and of the individual partners, but only provided an instrument, if one was needed, to carry the rule into full effect, and that Section 5 was not intended to introduce any new and radical rule of marshaling assets.

The Court in *In re McCoy*, 150 Fed., 106, considered the application of Section 5 to the question of double proof and said:

"This provision was not intended, as we look at it, to modify in any respect, the pre-existing law. The section is, indeed, only a reenactment of pre-existing law."

This Court in dismissing the appeal from the order of the Circuit Court of Appeals *In re McCoy* (*Chapman vs. Bowman*, 207 U. S., 89), at page 92, said:

"The decision below proceeded on well settled principles of general law broad enough to sustain it without reference to the provisions of the Bankruptcy Act."

The Court in thus declining to accept jurisdiction because there was no question of the construction of the Bankruptcy Act involved, necessarily reached the conclusion that Sections 5-f and 5-g of the Bankruptcy Act did not in any way affect the provability of the claims.

Section 5f in the McCoy case was relied on by the district Judge in expunging the claims against the individual estate in his opinion printed in 150 Fed., pages 109-111. This opinion might well be a paraphrase of the opinion rendered by the Circuit Court of Appeals in this case. The order of the District Court, however, was reversed by the Circuit Court of Appeals for the 7th Circuit in an opinion expressly holding that Section 5-f had no application, and this conclusion was sustained by this Court.

LASTLY.

This is a case where this Court should examine into the judgment of the Circuit Court of Appeals on a Writ of Certiorari.

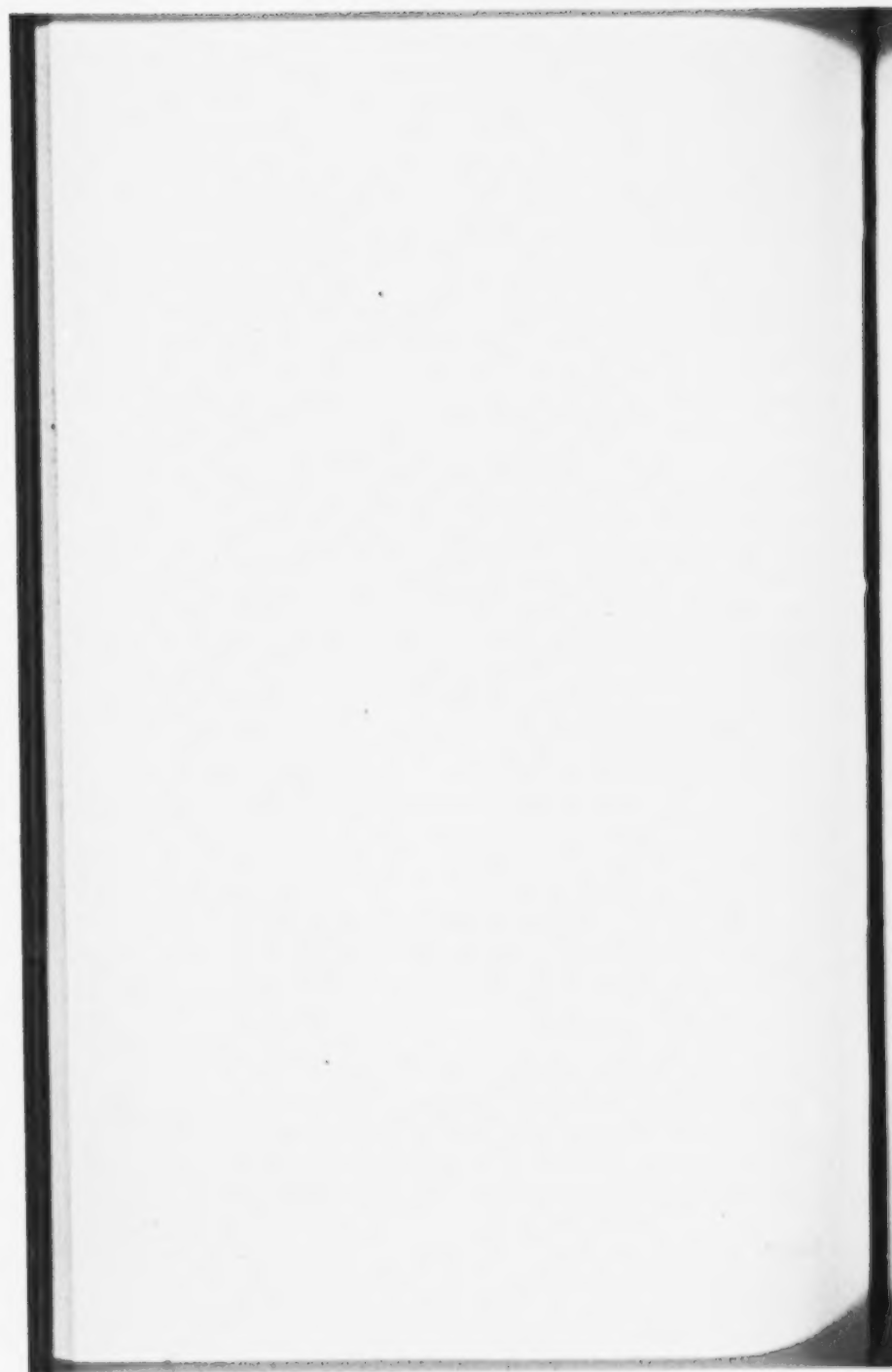
As we have pointed out in our petition, the record presents two important questions of construction of the Bankruptcy Act of 1898. The interests involved are large. The questions presented are of public as well as of private interest and questions

which although much litigated in times past have never been settled by this Court, and about which Circuit Court of Appeals have entertained divergent views. These same questions will constantly recur, and it is important that they should be settled once and for all by the final decision of this Court.

Respectfully submitted,

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No. 84

FILED

NOV 13 1919

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

WILLIAM SCHALL, et als.,
Petitioners,
against

FREDERICK CAMORS, et al., Trustees of Estates
of Albert LeMore and Edward E. Carriere,
Bankrupts,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT.

BRIEF FOR PETITIONERS.

RALPH S. ROUNDS,
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of Counsel.



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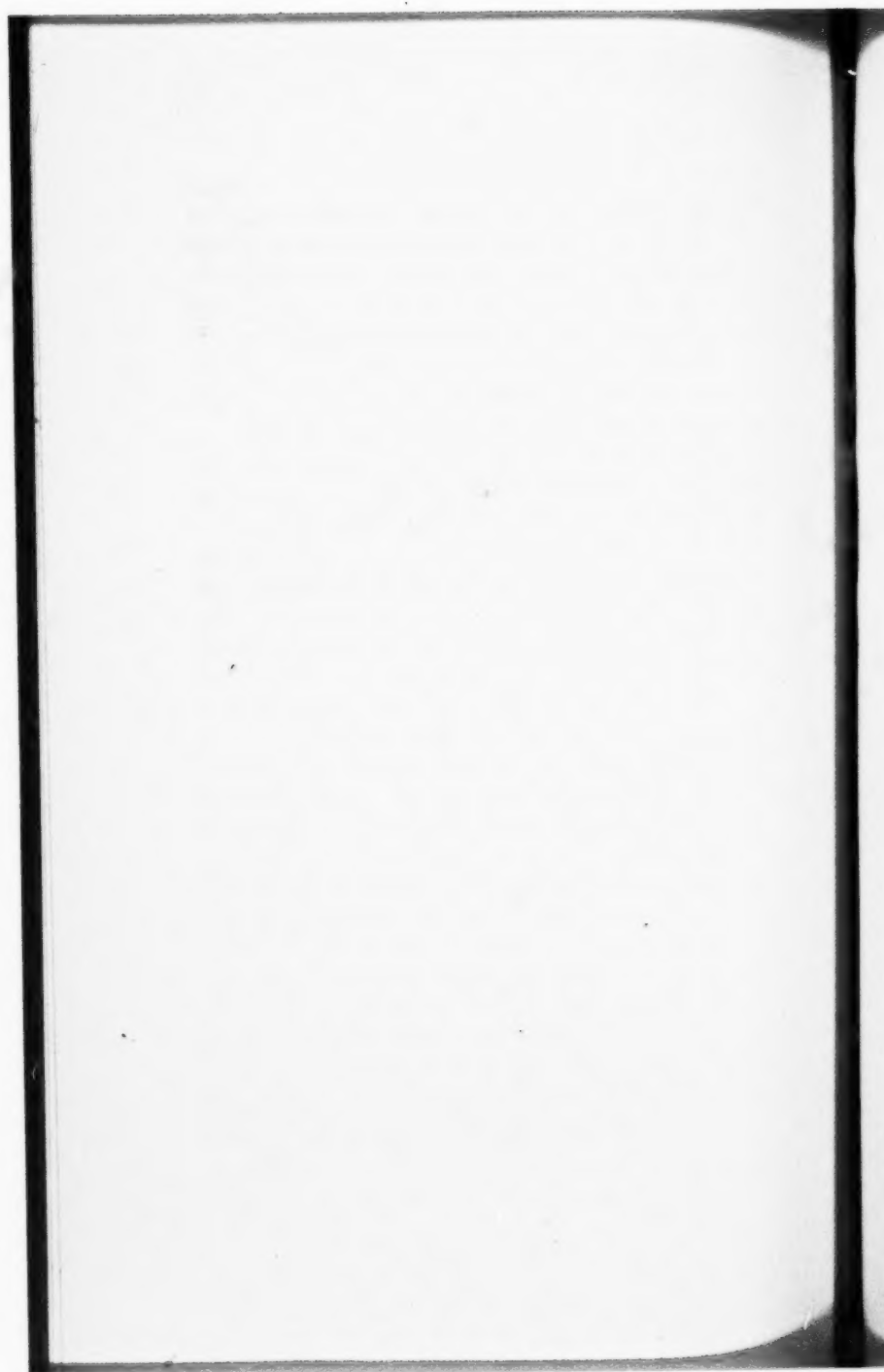
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Supreme Court of the United States

OCTOBER TERM, 1919.

WILLIAM SCHALL et als.,
Petitioners,
against

FREDERICK CAMORS et al., Trus-
tees of Estates of Albert Le-
More and Edward E. Carriere,
Bankrupts,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Preliminary Statement.

The case is in this Court on writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted by this Court on May 23, 1918.

On the 8th day of May, 1915, the petitioners filed their claims in bankruptcy against the partnership estate of A. LeMore & Company in bankruptcy proceedings pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division; they also filed separate proofs of claim against the separate estates of Albert LeMore and Edward E. Carriere, the partners composing the firm of A. LeMore & Company. On July 22, 1915, the Trustees in Bankruptcy of A. LeMore & Company and of the estate of the individual partners of that firm obtained from Hon. William A. Bell, Referee in Bankruptcy, an order to show cause why the proofs of claim against the individual estates of Albert LeMore and Edward E. Carriere should not be expunged.

On the 26th day of November, 1915, the order to show cause came on for hearing before the said Referee, and on May 25, 1916, the Referee made his order directing that the claims filed against the individual bankrupt estates of Albert LeMore and Ed. E. Carriere be expunged and disallowed. The petitioners on June 17, 1916, filed their petition to review the order of the Referee, which said petition was duly allowed, and on September 6, 1917, the United States District Court for the Eastern District of Louisiana dismissed the petition and affirmed the order of the Referee. On September 13, 1917, the petitioners appealed from the said order to the Circuit Court of Appeals for the Fifth Circuit and said Court on the 17th day of January, 1918, affirmed the order of the District Court.

The petitioners thereupon applied to this Court for a writ of certiorari, which was thereafter granted.

Statement of Facts.

Albert LeMore and Ed. E. Carriere were co-partners in business in the City of New Orleans under the firm name and style of A. LeMore & Company. Between November 5, 1913, and January 28, 1914, they sold to the claimants through an agent in New York named Trippe (pages 25, 27) bills of exchange and checks on London, Paris and Antwerp aggregating about \$70,000. Four drafts aggregating the equivalent of \$54,200.41 (pages 3-4; 10-12; 16-17), were accompanied by bills of lading purporting to show the shipment of staves of the invoice value of the amount of the drafts. The two checks aggregating the equivalent of \$14,405.93 were not accompanied by bills of lading.

The drafts and the checks were sold to Muller, Schall & Company on the faith of representations made to them in writing that A. LeMore & Company, drawers of the drafts and checks, was a solvent concern with assets largely in excess of its liabilities (pages 4; 5; 12; 13-14; 17-18; 19-20). As a matter of fact, these statements were false, A. LeMore & Company was at the time of the sale of the drafts and checks insolvent with liabilities very largely in excess of its assets and carrying on a business based largely upon misrepresentation (pages 4; 5; 12; 13-14; 17-18; 19-20).

The bills of lading annexed to the drafts were

spurious in that they did not represent any shipments of staves (pages 4-5; 12; 18), and although the drafts and checks were accepted by the drawees they were not paid at maturity and were protested and notice of dishonor and protest given to the firm of A. LeMore & Company (pages 4; 5).

Muller, Schall & Company filed three proofs of claim, one against the firm estate (pages 2-9) and one against the individual estate of Albert LeMore (pages 9-14) and one against the individual estate of Ed Carriere (pages 15-20). These proofs of claim all set forth the purchase by Muller, Schall & Company of the drafts and checks above mentioned on the faith of the representations made to them, as stated above. They also set forth that the partnership was at all the times in question insolvent with assets much less than its liabilities and was doing an unprofitable business based largely upon misrepresentation, all of which Albert LeMore and Edward E. Carriere well knew, and that the transactions were wholly false and fraudulent to their knowledge and were intended to defraud Muller, Schall & Company.

The proof of claim against the firm set forth the presentment of the drafts for payment, their dishonor and their protest and notice of dishonor given to the partnership as well as non-payment of the drafts (pages 4-5). The claims against the individual partners, although setting forth presentment of the drafts for payment and dishonor, do not set forth the giving of notice of dishonor.

The allegations of the proofs of claim were not put in issue by the trustees in bankruptcy who petitioned the Court to expunge the claims against

the separate estates of the individual partner on the ground that a claim was properly provable only against the partnership estate and not against the individual partners (page 23).

On the hearing on the order to show cause granted on said petition, Edward E. Carriere, one of the bankrupts, was called and testified in effect that the drafts referred to in the proofs of claim were sold to Muller, Schall & Company of New York by an agent of the partnership named Trippe; that Albert Lomore was in Europe at the time that such drafts were sold and that the moneys were remitted by cable to Europe to meet payment of drafts maturing to Gairard (the drawee of some of the drafts) and others and that neither Lomore nor Carriere individually received any of the money advanced by Muller, Schall & Company upon purchase of the drafts and checks (pages 24 and 25).

Mr. Carriere refused to answer questions on cross examination as to a statement sent by him to Mr. Trippe purporting to be a statement of the financial condition of A. Lomore & Company, on the ground that he was then under indictment in the Federal Court, and because of his failure to submit himself to cross examination his testimony in chief was stricken out. That Mr. Carriere's fear of cross examination in connection with these frauds was well founded is shown by the record in this court on the application by LeMore and Carriere for a writ of certiorari to the Circuit Court of Appeals of the Fifth Circuit to review the judgment of that Court affirming a judgment of the District Court which found them guilty of using the

mails to defraud. (*Albert LeMore, et al vs. United States*, January 27, 1919, petition for a writ of certiorari to the Circuit Court of Appeals for the 5th Circuit denied; 248 U. S., 586.)

The trustees then called one Harris, a clerk employed by A. Lemore & Company, who testified in general to the same facts testified to by Mr. Carriere (pages 26-28).

Outline of our Argument.

Albert LeMore and Edward E. Carriere were both implicated in a criminal scheme to defraud. In furtherance of this scheme they caused fraudulent representations to be made to Muller, Schall & Company and as a result thereof Muller, Schall & Company paid them a large sum of money. These facts are established by the allegations of the proofs of claim, and are not denied by the trustee, and the prima facie case made by the proofs of claim is not met by the evidence adduced at the hearing (Point 1; page 8).

The proofs of claim filed against the individual estates of the partners setting forth the facts of the fraud prove a several liability distinct from that of the firm against the individual partners in quasi contract or equitable debt (Points 2 and 3; pages 10, 14, as well as in tort for fraud (Point 4; page 24).

The proof of claim filed against the firm setting forth the fraud proves a joint claim on express contract (which is admitted by the trustees) as

well as a claim in quasi contract or equitable debt because the firm received the proceeds of the frauds (Point 3; page 14).

The claims filed against the firm and the individual partners are joint and several claims, and the claims may therefore be proved and dividends allowed against the joint and several estates in bankruptcy (Point 5, page 59).

It is only just that Muller, Schall & Company should have the right to prove these separate claims. They did not rely alone upon the drafts in paying out their money but they also relied upon the false representations made which were binding upon the partners severally because they were known to them to be false and because the sale of the drafts and the representations made were in furtherance of a fraudulent business.

The right to make separate proof against the estates of the individual partners and also against the firm estate is not prevented by the provisions of Section 5-f of the Bankruptcy Act (Point 6; page 78).

POINT I.

The participation of Albert LeMore and Ed. E. Carriere in the fraud perpetrated upon Muller, Schall & Company by reason of which they bought and paid for the drafts is proved by the allegations of the proof of claim, and such allegations have not been disproved by the trustee on the hearing.

As we have shown, all the proofs of claim expressly stated that false representations were made to Muller, Schall & Company at and before the time of the purchase of the drafts referred to in the proofs of claim for the purpose of inducing them to purchase such drafts (pages 4, 5, 6, 12, 13, 14, 17, 18, 19, 20); that these representations were to the effect that the drafts were drawn against shipments of staves and that the firm of A. LeMore & Company was solvent and its assets were legally in excess of its liabilities; that the partnership was doing an unprofitable business largely based on misrepresentation, all of which Albert LeMore and Edward E. Carriere well knew and that the transactions were wholly false and fraudulent to the knowledge of the said Albert LeMore and Edward E. Carriere and were intended to defraud Muller, Schall & Company.

The trustee did not put in issue the fact that the partners were engaged in an unprofitable business based largely upon misrepresentations or that the statements were false, nor was there any denial that the partners knew that the transactions were false and fraudulent.

It is now well settled that a proof of claim in bankruptcy made in accordance with the statute is *prima facie* evidence of all the facts therein contained.

Whitney vs. Dresser, 200 U. S., 532.

Board of Commerce vs. Security Trust Co.,
225 Fed., 454.

In re Elk Valley Coal Mining Co., 210
Fed., 386.

Moore vs. Crandall, 205 Fed., 689.

In re Dunlap Carpet Co., 206 Fed., 726.

In order to meet the *prima facie* case made by a proof of claim, an objecting trustee must overcome it by competent evidence. This the trustee on the hearing did not even attempt to do. He confined himself to proving that the drafts were sold in New York through the instrumentality of an agent named Trippe, and that the funds were used for partnership purposes. These facts are not denied by the claimants.

Accordingly, as the Circuit Court of Appeals has stated in its opinion, there is no conflict as to the facts and no denial made by the trustees that Albert Lemoire and Edward E. Carriere were engaged in perpetrating systematic frauds and that as a part of these fraudulent transactions Muller, Schall & Company were induced to part with \$70,000 of their money.

POINT II.

Upon the facts shown by the record, the Circuit Court of Appeals erred in holding that the individual claims arising out of the conscious and criminal fraudulent acts of the individual partners, Albert LeMore and Edward E. Carriere, did not give rise to separate claims against their individual estates.

The Circuit Court of Appeals in its opinion (page 64) said:

"It is contended by appellants that they were creditors both of the partnership and of the individual members. The facts from which their claims arise are not in dispute. The appellants were induced to purchase drafts of the bankrupt firm, supposed to be secured by bills of lading representing shipments of staves, through false representations made to them or contained in the forged or fraudulent bills of lading that were attached to the drafts. The drafts were not paid. The claim, proven against the partnership, was upon the drafts, as partnership obligations in contract. The claims, attempted to be proven against the individual estates of the partners, were for damages for the false representation, alleged to have been made by the partners. The partners were cognizant of the frauds, though the particular drafts were not signed or endorsed or negotiated by either partner, and neither part-

ner profited from the transaction except through his interest in the firm. The transaction was one in the ordinary course of the firm business, except that it was a fraudulent one, and the proceeds of the drafts went to the credit of the firm and were used in the conduct of its business. Eliminating its fraudulent character, the transaction was altogether a partnership one, and would have supported proof of claim only against the partnership estate. It is contended that the commission of the fraud was the act of the partners, even though they did not, in person, sign and negotiate the drafts, because the fraud of their agent was imputable to them, and because they knew of the fraudulent system, under which the firm was doing business. * * * We think the determination as to whether the claim is partnership or individual or both, should depend upon the real character of the transaction, and, if that be unmistakably an exclusive partnership one, neither fiction nor implication should be resorted to to give it a different character. If the partners had by separate contract of guaranty obligated themselves to the claimants, such separate contract would have afforded a basis for a claim against their individual estates. So, if it had been shown that their individual estates had been enriched by the transaction complained of, or that they had been guilty of a separate and personal delinquency from that of the partnership, an individual obligation to make restitution to the injured claimant might have been implied. In the absence of a separate, individual obligation, or a

showing of benefit moving to the partner individually from the transaction, we can see no reason for sustaining a double proof of claim in favor of the implied obligation, when it would not be sustained where the obligation is an express one."

We believe that a brief analysis of the Circuit Court of Appeals opinion will show that the conclusion reached by the Circuit Court of Appeals is based upon the premise that the proofs of claim do not establish a separate and independent liability on the part of the individual partners.

The proofs of claim against the individual partners expressly charge individual wrong. The opinion of the Circuit Court of Appeals admits that the individual partners were cognizant of the frauds but emphasizes the fact that they did not individually sign the drafts or directly divide the spoils. Certainly, in the popular sense, when persons are implicated in frauds as partners to the extent that they receive prison sentences, their conviction is predicated upon individual wrong, and if they serve their sentences, their incarceration is an individual and not a partnership matter. The decision of the Circuit Court of Appeals, it seems to us, apparently amounts to a statement of the following proposition:

Two thieves are engaged in a conspiracy to defraud. If, doing business on a small scale, they employ no agents or accomplices and acting in concert do all the evil work themselves, and keeping no books divide the spoils after each operation, they are severally liable to restore their plunder. If, on the other hand, the ramifications of their business

are such that they employ agents and accomplices to come in immediate contact with the outside world and, instead of the crude method of dividing spoils at the end of each operation, keep accounts showing the operations of the joint enterprise and use the moneys received for the furtherance of their criminal acts, dividing among themselves from time to time moneys in the joint account—calling themselves a partnership—they are not individually liable for their fraudulent, criminal acts but are only jointly liable.

We think that the statement of this proposition in its bald terms shows that it is unsound and will not bear analysis; for no reason suggests itself why persons engaged in fraudulent, criminal acts in the guise of a partnership should be relieved from several liability for their wrongs merely because they use agents or accomplices to aid them in the perpetration of their frauds in connection with a partnership enterprise and employ a joint fund as a means of furthering their frauds as well as affording a means of conveniently disposing of the plunder for division among themselves from time to time, and we shall show under Points 3 and 5 of our brief that the authorities clearly establish that where a partner is privy to a fraud, even though perpetrated for the benefit of the partnership, in bankruptcy his separate estate is severally liable in quasi contract or equitable debt to restore the moneys obtained by fraud, and we shall show in Point 4 of our brief that his separate estate is also severally liable in tort.

It is well to notice here that the claimants do not rest their right to prove against the separate estates of the partners upon any implied several

obligation of an innocent partner to answer for the debts of the partnership, but upon the conscious criminal participation of the two partners of A. Lemoire & Company in their conspiracy to defraud.

POINT III.

The petitioners' claim is a provable claim against the individual partners on the ground that the fraud of the individual members of the firm made them liable in quasi contract or equitable debt; and against the firm in express contract or in quasi contract or equitable debt, because it received the proceeds of the frauds.

The nature of an indebtedness incurred by individual members of a firm for frauds perpetrated by them in firm transactions is authoritatively established in England by the case of *Ex parte Adamson; In re Collie*, Law Reports, 8 Chancery Division, page 807.

Members of the firm of A. & W. Collie induced one Adamson to accept certain drafts by reason of false representations of one of the members of the firm (the falsity of which it was assumed the other partners should have known) and Adamson subsequently was compelled to pay the amount of the acceptance. The firm of A. & W. Collie went into bankruptcy and Adamson sought to prove his claim against the separate estate of one of the partners. It was held that he could prove such a separate claim by reason of the fact that the partner against whose in-

dividual estate proof was sought to be made was one of the parties to the fraud and that the proof should be allowed. The Court said (page 818):

“Mr. Adamson was induced to accept bills of exchange for a very large amount, on the representation that they were bills, or renewals of bills, representing the purchase-money of large quantities of cotton, stated to have been purchased on the joint account of Mr. Adamson and the two Collies, and continued to be held by them on such joint account. This representation was wholly, or almost wholly, fictitious, and there is no doubt that Mr. Adamson was cheated out of the acceptances which he gave, and which he had to meet when they matured. That Alexander Collie was guilty of the frauds there is no dispute, and, in the absence of evidence to explain his part of the transaction, it is impossible not to hold that William Collie, who himself signed letters and accounts constituting the false representations of the fictitious cotton dealings, must be held to have been aware that he was lending himself to his brother's frauds. There was, therefore a fraud practiced on Mr. Adamson in which both the Collies were participators. And it has always been held in the Court of Chancery that for a fraud, as for a breach of trust, each participator is liable in solido. Some doubt was, however, suggested in the course of the argument whether proof could be made in bankruptcy for a fraud any more than for other torts. A great many cases—if cases were necessary—show that proofs have

been allowed in bankruptcy for fraud, and on the ground of fraud only, where on a mere breach of contract they would not have been admitted. A notable instance of this is in the proof allowed in *Read vs. Bailey*, by the joint estate against the separate estate for money fraudulently abstracted from the partnership assets, a decision which only followed a whole line of recognized authorities. But, in truth, the proof is not for the fraud or for the tort. The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated. If a man had been defrauded of any money or property and the cheater afterwards became bankrupt, if the money could be earmarked, or if the thing could be found in specie, or traced, the assignees or trustees were made to give it back, or if it could not be earmarked or traced, then proof was allowed against the estate. It was a very common thing to have a suit against solvent persons and the assignees of a bankrupt, to set aside transactions as fraudulent, and to have a decree against the solvent persons, and a declaration of a right of proof against the estate of the bankrupt. This was done as a matter of course in the case of *Phosphate Sewage Company vs. Hartmont*. In cases of fraud, or breach of trust, which is often only one form and instance of fraud, there never

was any division of liability between the tortfeasors every person participating in the tort was liable to make good the whole; the liability of each in equity was for the whole amount. And the proof in bankruptcy was exactly commensurate with that liability; it being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law, or in equity, was a provable debt in bankruptcy. It is said in the books that debts due by reason of fraud or breach of trust are joint and several. There is here a slight inaccuracy. Of course tort-feasors may be sued all in one action, or in several actions, but there is not really or practically any joint liability as distinct from the several liability, except where there is a partnership and a joint estate. It is a mere accident, but a frequent accident, that the fraud is connected with a partnership, but where it is, the result often is that the partnership in its joint character is liable for it. If the profits or the proceeds of the fraud found their way into the partnership, then on that ground the partnership became indebted for them, or if the fraud was in the course of the partnership business, and was practiced by one of the partners on a client or customer of the firm, then the firm—however innocent the other partners may have been, and although the guilty partner alone stole the plunder—was held liable to make full restitution to the defrauded client or customer. But this right to go against the partnership assets did not re

lieve the guilty party or parties of his or their personal and separate liability by reason of his or their actual participation. If in a partnership of A, B, C and D, and in a partnership matter, A and B shared in a fraud upon a customer, they would be severally liable, and the joint estate would be liable to make restitution; but not the separate estates of C and D and the rule about joint and several liability must be read with this qualification; but, so qualified, the rule is a well established rule. * * * (Italics ours.)

We have quoted at length from the opinion in *Ex parte Adamson* because the facts in that case so nearly resemble the facts in the case at bar and the principles enunciated are so clearly stated and are so plainly applicable to this case.

It is also well established in England that proof can be made as upon an implied contract in cases where an individual member of the firm is implicated in the misappropriation of moneys by the firm (*In re J. & H. Davison*; *ex parte Chandler*, 13 Q. B. D., 50).

The principles laid down in the case of *In re Adamson*, *supra*, are by no means peculiar to English law. A similar result has been reached in many cases in courts in this country. One of the early cases on this point in this Court is *Catts vs. Phalen et al.*, 2 Howard, 376.

The plaintiffs were conducting a lottery. They employed the defendant to perform the manual operation of drawing the lottery tickets from the lottery wheel. Defendant conspired with one Hill

to purchase lottery tickets from the plaintiffs and fraudulently contrived that the lottery numbers drawn should bear the same numbers as the lottery tickets purchased by Hill. This court held that because of the fraud the defendant was liable in an action for money had and received, for the money which was paid by the plaintiffs to Hill and in turn paid to the defendant because of plaintiffs' belief that the numbers drawn from the lottery wheel had been fairly and honestly drawn and corresponded with the numbers upon the tickets purchased by Hill.

Burton vs. Driggs, 20 Wallace, 125. The defendant by the production of a sealed instrument containing a false recital induced the plaintiff to purchase a certain claim from him. The Court held that because of the false representations made, the plaintiff could recover from the defendant in assumpsit the amount obtained by false representations.

In re J. Arnold & Co., 133 Fed., 789. The bankrupts received money from depositors who knew that the moneys deposited were to be used by the bankrupts in gambling ventures. The bankrupts made fraudulent representations to their depositors that they were earning sufficient profits to pay a stipulated weekly interest; that they were solvent and responsible and had on hand sufficient money to pay all their depositors the amount of their deposit, and that they did not pay dividends out of receipts. These representations were false.

When proof was sought to be made against the bankrupts for moneys deposited under the circumstances set forth above, it was objected that the deposit was in furtherance of a gambling transaction

and was against public policy, but the proof was allowed as a claim in quasi contract. The Court said (page 791) :

"To deal with this case on the theory that the depositors and the bankrupts were simply engaged in an unlawful or gambling business is altogether too superficial a view. From the facts found by the referee, it is undoubtedly true that the bankrupts secured money from their so-called depositors by false and fraudulent representations of material facts. On familiar principles of law they thereby secured no title to the money as against a depositor who might, on discovery of the fraud, take legal steps to regain possession of his money. The law is equal to this emergency. It treats the fraudulent actor as a trustee for his victim. A constructive trust is created by the fraud practised in securing the money. And in bankruptcy proceedings which are summary and equitable in their nature, the creditor may invoke this salutary principle of law by proving up a demand for money had and received by the bankrupts to their use."

Pomeroy, Equity Jurisprudence, Third Edition, Section 1047, states the rule to be :

"By the well settled doctrine of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it ; as, for

example, when money has been paid by accquired through a breach of trust, or violation of fiduciary duty, and the like. It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit; but in many instances a resort to the equitable jurisdiction is proper and even necessary."

Stanhope vs. Scafford, 77 Iowa, page 594. The defendant sold to the plaintiff 320 acres of land and made certain representations as to its quality, stating it to be worth the price paid for it. These representations were false and fraudulent. The land, instead of being worth \$2240, the purchase price, was really worth no more than \$640. The plaintiff sued to recover the difference of \$1600 and judgment was allowed in his favor in the sum of \$1551.36. On appeal the question was raised whether or not the facts would sustain a recovery upon an implied promise by the defendant to pay the loss suffered by the plaintiff. The Court said:

"Counsel for defendants insist that the claim or cause of action upon which the plaintiff's suit is based is not a debt due for property obtained by false pretenses. We understand that the motion is based upon this position. The petition alleges false representations and pretenses, including a purchase by him for twenty-two hundred and forty dollars of property really worth no more than six hundred and forty dollars. Plaintiff thus sustained loss and damage to the extent of sixteen hundred dollars if

he should retain the property purchased, as he is, by the law, authorized to do.

"Under familiar rules of the law which will be recognized by the profession without the citation of authorities, defendants, having received pecuniary advantage from the misrepresentations and false pretenses, are liable in a civil action as for a debt, the plaintiff being authorized to waive the right of proceeding as for a tort, and to sue for the loss and damage he sustained. The defendants in that case are liable for such loss and damage, and their liability is a debt arising on the implied promise which the law raises that they will pay the loss suffered by the plaintiff. See *Warner vs. Cammack*, 37 Iowa, 642, and *McDole vs. Purdy*, 23 Iowa, 277. The debt to recover for which this action is brought is due for property obtained under false pretenses. Code, Section 2951, par. 12. The attachment was therefore rightly issued, and should not have been dissolved. These considerations dispose of all questions in the case."

First State Bank vs. McGaughey, 86 Southwestern, 55. The defendant sent a telegram to the plaintiff asking "Will you pay C. W. Clark's checks for cattle?" On the same day the plaintiff replied by telegram "Yes." Thereupon C. W. Clark drew a sight draft on appellant for \$8500, payable to the order of the defendant, which was paid by plaintiff in due course of business, plaintiff receiving the amount of the draft on or about the day of its date. Suit was brought by plaintiff against the defendant to recover \$1650 of the sum so paid, the petition al-

leging "that in principle and in effect only \$7200 of said draft given by said Clarke to defendant as aforesaid was for catttle and the balance of said draft, to wit, \$1650 was not for cattle but was for some other purpose unknown to plaintiff." It was held that on the facts above stated the defendant was liable to plaintiff in a suit for money had and received. The court said (page 56) :

"Considering, then, on its merits, the question raised by the appeal, and indulging every reasonable intendment in favor of the petition, we have the case of money paid A by B, at the request of C, in excess of the amount B had promised or was under obligations to pay, the excess having been paid by B in the mistaken belief that he had promised and was under obligation to pay the full amount, whereas A received the money knowing that B had not promised to pay the amount so received. In such cases the law would imply a promise on A's part to pay the excess back to B. It is perhaps needless to say that in this illustration A represents appellee and B appellant."

We think that these cases establish that Muller, Schall & Company by their filed proofs of claim have proved a claim against the individual partners in quasi contract or equitable debt, and have also proved a claim against the firm on the drafts and in quasi contract or equitable debt because the frauds were perpetrated in connection with a firm transaction and the firm received the benefit of the fraud, and that the claim is not merely "upon the

drafts" as stated by the Circuit Court of Appeals in its opinion (page 64).

It follows, therefore, entirely irrespective of whether or not the claims against the individual partners and against the firm are provable jointly and severally in tort for fraud, both the claims against the individual partners and against the firm are claims properly proved as claims in quasi contract or equitable debt.

POINT IV.

The claims filed by Muller, Schall & Co. against the separate estates of Albert LeMore and Edward E. Carriere are provable in bankruptcy as tort claims.

The question whether or not a claim for pure tort is provable in bankruptcy, has, strange to say, after the nineteen years that the bankruptcy act has been in operation, never been definitely decided by this Court. The ultimate decision will rest upon the construction given to subsection b of Section 63 of the Bankruptcy Act.

In *Crawford vs. Burke*, 195 U. S., page 176, the defendant-in-error directly raised the question of the provability of tort claims under Section 63b, and discussed the question at length in his brief, contending that no tort claims could be proved in bankruptcy, but this Court said (195 U. S., at page 186) :

"Provable debts are defined by Section 63, a copy of which appears in the margin. Para-

graph a of this section, includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph b, two constructions are possible: It may relate to all unliquidated demands or only to such as may arise upon such contracts, express or implied, as are covered by paragraph a.

Certainly paragraph b does not embrace debts of an unliquidated character and which in their nature are not susceptible of being liquidated (*Dunbar vs. Dunbar*, 190 U. S., 340, 350). Whether the effect of paragraph b is to cause an unliquidated claim which is susceptible of liquidation but is not literally embraced by paragraph a, to be provable in bankruptcy, we are not called upon to decide."

In the earlier case of *Dunbar vs. Dunbar*, 190 U. S., 340, this Court expressed the opinion (which, however, was not necessary to a decision of the case) that subsection b adds nothing to the class of debts which may be proved. This expression, however, was in accord with the contentions of counsel for both parties. Counsel for the plaintiff-in-error, at page 20 of his brief, saying:

"Paragraph b does not enlarge the class of debts which may be proved but provides that claims within the scope of paragraph a, if unliquidated, may be liquidated and proved."

The brief for the defendant-in-error, in that case, on page 5, stated:

"The only reference in the Act of 1898 to contingent claims, even by construction, other

than that of the surety of a bankrupt (Sec. 57i) is contained in Section 63b. This paragraph, however, does not in any way enlarge the class of debts which may be proved, but provides that, if any claim coming within the scope of Section 63 is unliquidated, it may be liquidated and proved."

Both counsel therefore conceded without discussion in the Dunbar case that Section 63b did not extend the enumeration in Section 63a and stated the proposition in almost identical terms and this Court adopted the statement of counsel in the briefs without undertaking an analysis of the statute.

As this Court in its decision in *Crawford vs. Burke*, refused to follow its dictum in *Dunbar vs. Dunbar*, and confined the operation of that case to what was actually decided, viz., that paragraph b of Section 63 does not embrace debts of an unliquidated character and which in their nature are not susceptible of liquidation, it thereby left the question as to the operation of Section 63-b open for future decision. And the point has never since been presented to and decided by this Court, although there are strong intimations in *Friend vs. Talcott*, 228 U. S., 27, and in *Clarke vs. Rogers*, 228 U. S., 534, that tort claims are provable.

In *Friend vs. Talcott*, 228 U. S., 27, at page 39, Chief Justice White, writing for the Court, in commenting on provable debts said:

"Thus Section 63 a and b (30 Stat., 562) enumerates the debts which may be proved and which are therefore entitled to participate in the benefits of the act and are bound by its provisions, including a discharge."

In *Clarke vs. Rogers*, 228 U. S., 534, a case involving the embezzlement of trust funds in which it was very difficult to work out a contract, implied in law or in fact, this Court, although holding that a contract in law to repay the embezzled funds did exist, also justified the decision upon the additional ground that in any case the embezzlement of the moneys constituted a provable debt against the bankrupt estate. The Court said at page 547:

"This ruling brings the case at bar within *Crawford vs. Burke* and *Tindle vs. Birkett*, even if their application be as limited as appellant contends. It may be questioned if they are so limited. They recognize the relation of Section 63a to Section 17. Section 17 excludes certain debts from discharge, among others, those created by the bankrupt's 'fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.' It was said in *Crawford vs. Burke*, 'If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of the discharge?' The question was pertinent in view of the language of the section. It provides that 'a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as,' etc. The relation of the section was also recognized in *Friend vs. Talcott*, ante, page 27. It is there declared that Sec. 17 enumerates the debts provable under Sec. 63a which are not discharged. Among them, we have seen, are those created by fraud, embezzlement, misappropriation or defalcation in any fiduciary capacity.

It would seem, therefore, to follow that the conversion of trust funds creates a liability provable in bankruptcy."

Collier on Bankruptcy, 9th Ed., page 853, considers the subject as follows:

"Liabilities grounded in contract are, almost without exception, provable. So also are judgments grounded in tort. Whether mere liabilities *ex delicto* may be liquidated and thus become provable has been doubted. Under the former law such claims, if 'on account of any goods or chattels wrongfully taken, converted or withheld,' i. e., if in conversion, were provable, but only after being duly liquidated. With the single exception next noted, other liabilities sounding in tort were not. Debts created by the fraud or embezzlement of the bankrupt were, by the terms of another section, made provable, but were also declared not dischargeable. Even the clause above quoted has been omitted from the present law; the same is silent as to the provability of debts in fraud or for embezzlement. Hence, the argument that such mere liabilities are not provable. But, strictly, debts grounded in tort are as much liabilities as are those entirely *ex contractu*, and a distinction between those actually liquidated at the time the petition is filed and those which may be is somewhat artificial. Besides, Sec. 17 now excepts from dischargeable debts many 'provable debts' that are unliquidated torts; the words 'judgments in actions' in Sec. 17-a (2) having now given place to the word 'liabilities.' It would seem, therefore, that liabilities for torts *per se*, and not merely those

provable on the theory of quasi-contracts, may now be liquidated and proven and allowed, at least all those that are both *in praesenti* debts as (distinguished from fines or duties) and are excepted from the effect of a discharge by Sec. 17."

Cases in the Circuit Court of Appeals, among others, *Brown & Adams vs. United Button Company*, 140 Fed., 495; affirmed 149 Fed., 48; and *In re New York Tunnel Co.*, 159 Fed., 688, have held that a tort claim is not provable but these authorities have been questioned by a recent case in the Circuit Court of Appeals of the Fifth Circuit (*Jackson vs. Wauchula Mfg. Co.*, 230 Fed., 409), where the Court in considering the contention there made that a claim for personal injury not reduced to judgment was not provable in bankruptcy, said:

"So far as we are advised, the proposition has not been definitely settled by the Court whose decisions are controlling."

A recognition of the provability of tort claims is a just and logical development in the history of bankruptcy law.

Under early English Bankruptcy Statutes only claims that were liquidated were provable claims in bankruptcy.

Williams Bankruptcy Practice, 10th Ed., page 142, quoting from *Eden's Bankruptcy Law*, 1st Ed. page 129, says:

"Where damages are contingent and uncertain as in some cases of demands founded in

contract, and in all cases of torts, where both the right to any damage at all, and also the amount of them, depend upon circumstances of which a jury alone can probably judge, and which therefore, it requires the intervention of a jury to ascertain, such damages are not capable of proof under a commission. But in cases where, although the usual form of action which a creditor would have for his demand may be one in which he would recover it in the shape of damages to be given by the jury; although perhaps, in some instances he could have no other kind of action; yet if his demand is of such a nature as admits of being liquidated, and ascertained at the time of the bankruptcy, so that he can swear to the amount, he will be entitled to prove. Thus, a demand for goods sold, or for work and labour, without any agreement as to the price which the party would recover at law, as damages in assumption, on a *quantum meruit* may be proved, because the value can be easily ascertained and the creditor can swear to the amount."

Williams' Bankruptcy Practice (page 142) then proceeds to state that though there was a continuous tendency to relax the rule since 6 George IV, C. 16, no enactment prior to 1869, with the exception of §153 of the English Bankruptcy Act of 1861, directly affected the right of a creditor to prove in respect of damages arising from a breach of contract in cases where the amount of the damages neither had been ascertained nor was capable of being fairly estimated.

The English Bankruptcy Act of 1869, as well as the subsequent Act of 1883, expressly provided, §37 (1):

"Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy."

Similarly the American Bankruptcy Act of 1867, §19, after enumerating certain debts which might be proved, at the end of the section contained the provision:

"No debts other than those above specified shall be proved or allowed against the estate."

It will thus be seen that under the early English Bankruptcy Statutes proofs of unliquidated claims both in tort and on contract were not permitted; that subsequently the rule was relaxed to permit proof of unliquidated claims arising out of contracts, but lest in making the departure and permitting the proofs of unliquidated claims in contract it might be inferred that the rule against proof of unliquidated claims had been entirely abrogated, it was thought necessary in both the English Bankruptcy Statutes of 1869 and 1883 to provide expressly against the proof of unliquidated claims in tort.

Considered in the light of the history of these bankruptcy statutes, it is quite clear that the change in language in §63a and b of our bankruptcy statute of 1898 was designed to abolish entirely the old rule against proof of unliquidated claims and to permit proof of both tort and contract unliquidated claims. The rule was originally grounded in convenience and related to all unliquidated claims and there was no good reason when some unliquidated claims were admitted to proof to exclude others.

It was therefore natural in framing the Bankruptcy Act of 1898 and in stating claims which might be proved, that there should be embraced in one class (subdivision a) an enumeration of debts or claims which were liquidated or readily capable of being liquidated and which could be proved merely by the declaration or proof of claim of the creditor as under the old English bankruptcy practice and that there should be embraced in another class (subdivision b) claims which could not be liquidated without an assessment of damages. This class of claims, we contend, is not limited by the statute to contract claims but extends to all claims where damages may be assessed and provides that thereafter such claims shall be admitted to proof.

The structure of Section 63 indicates very plainly that "unliquidated claims" in sub-section b covers an additional and distinct class of provable debts.

The title of Section 63 is "Debts which may be proved." Embraced within this title are two sub-sections a and b of equal dignity of arrangement and embracing, as we believe, two classes of provable debts:

- (a) Debts (or liquidated claims).
- (b) Unliquidated claims.

The title is equally applicable to both of the sub-sections and if one sub-section enumerates debts which may be proved, so should the other.

This Court in *Knowlton vs. Moore*, 178 U. S., 41, at page 65, in considering a question of statutory

construction, gave great weight to the heading of the section of the statute which it construed holding that if ambiguity exists, the heading of the statute may be considered in its interpretation, citing *United States vs. Fisher*, 2 Cranch., 358, 386; *United States vs. Palmer*, 3 Wheat., 610, 631; *United States vs. Union Pacific Railroad*, 91 U. S., 72; *Smythe vs. Fiske*, 23 Wall., 374, 380; *Cossaw Mining Co. vs. South Carolina*, 144 U. S., 550.

Having in mind that the structure of Section 63a and b indicates two separate classes of individual claims, under the same title: "Debts which may be proved," it becomes important to consider why this structure was adopted. This question is readily answered when it is perceived that Section 63 is not only an enumeration of two classes of "debts which may be proved" but in connection with the enumeration each sub-section states the manner of proof of the claims embraced within it. Debts enumerated in sub-section a because they are, as we have shown above, debts in the sense that they would be admitted to proof under the old English rule because they are liquidated or capable of being liquidated by mere computation, need only be proved and allowed, while the unliquidated claims covered by sub-section b require judicial proceedings to determine the amount of the claim and must therefore first be liquidated by such proceedings and thereafter proved and allowed. The enumeration of claims in sub-section a was, we believe, for the purpose of defining the procedure in connection with such claims, and in fact the whole section is framed with reference to the procedure for proving the different classes of claims.

It therefore follows that if Section 63a is merely an enumeration of "debts" which may be proved and allowed without further proceedings because of their liquidated nature, it does not embrace "unliquidated claims" of any kind arising out of contract or otherwise, and "unliquidated claims" not being included in Section 63a but being a part of the enumeration of "debts which may be proved," are intended to be made an additional and distinct class of claims provable under Section 63b.

That the enumeration of different classes of claims in Section 63a is not intended as an enumeration of debts which may be proved, but only as an enumeration of debts which may be *proved and allowed* without preliminary liquidation by the Court, is clearly indicated by a consideration of 63a (5), which relates to claims:

"(5) Founded upon provable debts reduced to judgment, after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment."

If Section 63a, subdivisions (1) to (4) embrace the whole range of provable claims it was not necessary and was indeed foolish to add subdivision (5) embracing claims "founded on provable debts reduced to judgment after the filing of the petition." If the claim is already a provable claim and is already provided for in subdivisions 1 to 4, reducing it to judgment after the filing of the petition will not alter or affect its provable character. (*Boynton vs. Ball*, 121 U. S., 457.)

Indeed, it is well settled by the decisions of this Court that reducing a claim to judgment does not in general alter its character or change the nature of the claim. *State of Wisconsin vs. Pelican Ins. Co. of New Orleans*, 127 U. S., 265; *Kenny vs. Loyal Order of Moose*, 285 Ill., 188.

Section 63a (5), therefore, does not pretend to add to the enumeration of provable claims, if Section 63a (1) to (4) be deemed to be such an enumeration, but simply relates to the form which a claim may take in order to be proved and allowed by deposition or affidavit without further proceedings. This we have contended is also the character of every other debt enumerated in Section 63a and seems to us to show conclusively that 63a is not intended to be an enumeration of provable debts exclusive of all other kinds of debts, demands and claims, but is only an enumeration of claims which because of their form need no assessment of damages and can be made certain by simple computation and are therefore outside the class of claims which must "pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed."

The cases which hold that sub-section b, in spite of its inclusion with paragraph a in a section entitled "Debts which may be proved" (*Brown & Adams vs. United Bution Co.*, 140 Fed., 495, affirmed 149 Fed., 48, and *In re New York Tunnel Co.*, 159 Fed., 688), adds nothing to the enumeration of paragraph a, have admitted that under their construction all the debts enumerated in 63a are claims of a liquidated nature, i. e., claims which would have been admitted to proof under the old English rule, except those embraced in the last part

of 63a (4) which embraces "debts * * * founded upon an open account, or upon a contract, express or implied" and in order to limit Section 63b and to give it some application, have applied it to the last part of Section 63a (4) irrespective of the fact that every other "debt" enumerated in 63a is in the nature of a liquidated demand.

The construction upheld by these cases does violence to the rule of *noscitur a sociis* which, in every case of ambiguity, is an important canon of construction (Neal vs. Clark, 95 U. S., 704); for even if the words "founded upon * * * a contract, express or implied" as a part of sub-section a (4) were not qualified by their enumeration as debts (the latter term at the beginning of sub section a, as we shall show below, being employed in its narrow sense), they are preceded, followed and associated in the same phrase with demands of a liquidated nature. For all the purposes of sub-section a the words "founded upon * * * a contract, express or implied" should be limited to the same class of claims of a liquidated nature with which they are associated.

Any construction which limits the application of 63b to the last part of Section 63a (4) does violence to the arrangement of the sub-sections a and b. If Section 63b has no independent operation and no operation at all except in connection with the last part of Section 63a (4), why were its provisions not incorporated into 63a instead of being dissociated from Section 63a and set forth in another sub-section which has no grammatical or formal connection with Section 63a and is in form absolutely independent of that sub-section although embraced within the same title of "debts which may be proved?"

A construction of Section 63 allowing proof of tort claims in accordance with the structure and words of the section is supported by considering Section 63 together with other sections of the Bankruptcy Act.

Section 1 of the Bankruptcy Act of 1898 defines a debt as follows (Subdivision 11) :

“Debts shall include any debt, demand or claim provable in bankruptcy.”

The word “debts” in the subject of this definition sentence obviously has a different meaning from the mere plural of the word “debt” in the predicate. The word “debts” in the subject is used in a general sense embracing all claims capable of proof, and the word “debt” in the predicate is used in a more limited technical sense in which “debt” is not synonymous with “demand” and “claim.”

This double signification of the word “debt” in the definition sentence becomes important when it is considered in connection with the words of Section 63 of the Act. This section (63) is entitled “Debts which may be proved.” The word “debts” in the title obviously means debts in the broad sense including all “debts,” “demands,” and “claims” provable in bankruptcy in the same sense as the word “debts” as used in Section 1, subdivision 11.

Sub-section a of Section 63 also relates to “debts” and contains an enumeration of liabilities which are debts in the more restricted sense of liquidated demands, in the sense of debts entitled to proof under the earlier English statutes. This sub-sec-

tion (a), as we have heretofore shown, contains not only an enumeration of "debts" but makes it plain that such "debts" as are enumerated may be *proved and allowed*. Section 63a is therefore something other than an enumeration of certain liabilities which may be proved in bankruptcy; it is an enumeration of liabilities which may be proved and allowed without further formality because they are debts in a restricted legal sense which do not need to be liquidated as distinguished from other liabilities which must first be liquidated by the Court, and may thereafter be proved and allowed.

Section 63b of the Bankruptcy Act relates to the latter class of liabilities, or unliquidated claims. The word "claims" in sub-section b is used in a sense distinct from that in which the word "debt" is employed in Section 63a because "debts" may be proved and allowed while "unliquidated claims" must first be liquidated and thereafter proved and allowed. It seems, therefore, to follow that in the title of Section 63a the word "debts" is used in the same sense as in the subject of the definition sentence Section 1(11) and the word "debts" in Section 63a and the word "claims" in 63b are used in the same sense as those words are used in the predicate of the definition sentence Section 1 (11). The emphasis which we have placed on the definition of the words "debts" and "debt" in Section 1, subdivision 11, in their relation to the words "debts" and "claims" as used in Section 63, we believe to be justified by a comparison of the two sections, because we believe that Congress intended the definition to apply to the section (63) which particularly deals with provable debts, as other-

wise the definition sentence considered alone would be contradictory and meaningless, but considered in connection with Section 63 acquires a real and important significance.

Section 63 of the Bankruptcy Act when read with Section 17, and with other Sections of the Bankruptcy Act, plainly indicates that Congress intended that tort claims should be provable.

This Court has held in *Crawford vs. Burke*, 195 U. S., 176, 193, that in arriving at the proper construction of Section 3 of the Bankruptcy Act it must be read in connection with 17 of that Act. When Section 63 and Section 17, as amended in 1903, are read together, it becomes quite evident that tort claims are both provable and dischargeable. The enumeration of tort claims in Section 17 was considerably augmented by the amendment of 1903 and the only reasonable conclusion to be drawn from the inclusion by the amendment of certain liabilities for torts involving wrongful intent and moral turpitude is that Congress had clearly in mind that by the original enactment tort claims, even those embracing wrongful intent and moral turpitude, were provable and dischargeable.

Section 17 of the Bankruptcy Act before its amendment in 1903 provided as follows:

"Section 17. Debts not affected by a discharge. a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides;

(2) are judgments in actions for frauds or obtaining property by false pretenses or false representations or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Even before the amendment of 1903, Section 17 saved from discharge debts of the bankrupt which were "created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

In *Crawford vs. Burke*, *supra*, in interpreting this section, the United States Supreme Court said, 195 U. S., at page 193,

"If no fraud could be made the basis of a provable debt, why were certain frauds excepted from the operation of a discharge?"

It is clear from the opinion of the Supreme Court that it could not escape the conclusion that by excepting fraud claims from the operation of a discharge, the Bankruptcy Act recognized that such claims were provable, when Sections 63a and 63b and Section 17 were considered in relation to each other.

Crawford vs. Burke was decided under the provisions of the Bankruptcy Act as it existed before the Amendment of 1903.

In January, 1903, Section 17 was amended to read as follows:

"Section 17. *Debts not affected by a discharge.*—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

It will be noticed in the enumeration of debts which are exempted from a discharge contained in Section 17 after the amendment of 1903 that practically all are liabilities for torts. If tort claims, including the claims enumerated in Section 17, were not provable claims, they would not be discharged, and if they were not discharged because they were not provable, there was no reason for exempting them from discharge. The mere recitation of these tort claims in Section 17 indicates

that Congress believed that the claims therein enumerated were provable claims, and this conclusion is fortified by the reports of the Congressional Committee. We quote from the report which will be found in the Miscellaneous Documents of the 57th Congress, First Session, House Reports No. 6, being Report No. 1698. Referring to the proposed amendment to Section 17, the report says:

"The next amendment provides that liabilities for frauds, etc., as described in the act shall not be released by the discharge. As the law now is these liabilities must have been reduced to judgment or else the bankrupt is discharged. This amendment is in the interest of justice and honest dealing and honest conduct. This amendment further provides that a discharge in bankruptcy shall not release the bankrupt for alimony due or to become due to his wife, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation. It seems to the committee, and this is the universal sentiment, that the bankrupt ought not to be discharged from liabilities of this description."

It is evident that Congress believed that the various classes of torts enumerated in Section 17 as amended, which were not enumerated in the original section, were dischargeable in bankruptcy, and therefore provable. The Committee's report says, as to claims for fraud, etc.:

"As the law now is, these liabilities must have been reduced to judgment or else the bankrupt is discharged."

If claims for fraud generally were not provable, they would not have been discharged. The concluding sentence also throws light on the understanding of the Committee, for in speaking of alimony due or to become due and of seduction and criminal conversation, they state that the bankrupt ought not to be discharged from *liabilities* of this description.

The detailed analysis of the bill accompanying the report affords additional evidence that the Congressional Committee believed that all the liabilities enumerated in Section 17 were provable debts. They state:

"Section 6. The changes in Section 17 of the law are to settle questions arising from antagonistic decisions of the court and to exclude beyond peradventure certain liabilities growing out of offenses against good morals from the effect of a discharge. (Compare a similar amendment to the English act of 1883 by Section 10 of the amendatory act of 1890.)

"The substitution of 'liabilities' for 'judgments in actions' makes the clause broader. Now claims created by fraud but not reduced to judgment are discharged. Neither the claim nor the judgment should be. (Compare *In re Rhutassel* [Iowa], 96 Fed., 597, with *in re Lewenson* [N. Y.], 99 Fed., 73.)"

It is to be noted that the Committee believed and expressly stated that

"Now claims created by fraud but not reduced to judgment are discharged. Neither the claim nor the judgment should be."

Claims created by fraud would, of course, not have been discharged unless they were provable debts, and the recognition that they would be discharged is a recognition that they are provable debts.

The amendment of Section 17 of the Bankruptcy Act in 1903 constituted a legislative construction of the Act that tort claims were provable.

It is well settled that a statute is capable of legislative as well as judicial construction and that legislative construction by amendment of a statute is persuasive upon the courts.

Tiger vs. Western Investment Company, 221 U. S., page 286, at page 308, where this Court said:

"The construction contended for by the defendant-in-error places Congress in the attitude of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passage of the Act of 1906 and the expiration of the period named in the Act of 1902 with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress at least, restrictions still existed so far as the inherited lands of full-blooded Indians were concerned."

Baker vs. Swigart, 199 Fed., 865, 867.

"The first thing to do in such a case is to see just what the law making power has enacted.

If the provisions of the statute are plain and unambiguous, the Courts must accept the law as there declared; otherwise, they would usurp the function of the legislative department of the government. Of course, if the provisions of the statute in question be uncertain, conflicting or ambiguous, they become the proper subject for construction which is a function of the Court, in which event, and in aid thereof, resort may be had to any construction put upon it by any subsequent act of the same legislative body, if such there be * * *."

A comparison of §60 of the Bankruptcy Act of 1898 and the corresponding §35 of the Bankruptcy Act of 1867 indicates an intention not to follow the older statute but under the new law to admit tort as well as contract claims to proof.

Under the provisions of §35 of the Bankruptcy Act of 1867, a preference by an insolvent or one in contemplation of insolvency to any creditor or person having a claim against him was declared void, as was also any payment, sale, assignment, transfer or other conveyance made with a view to prevent the property from coming to the assignee in bankruptcy or to prevent the same from being distributed under the Act. This section is so worded that any transfer or payment to a tort creditor in satisfaction of a tort claim came within its provisions and was declared void.

Under the provisions of §60 of the present Bankruptcy Act the only preferences which are declared void are those which will enable any one of the creditors of the bankrupt to obtain a greater percentage of his debt than any creditors of the same

class. In construing that section this Court has held (*Richardson vs. Shaw*, 209 U. S., 365, at page 381; cf. *Clark vs. Rogers*, 228 U. S., 534) that it is only a transfer or payment to a creditor having a provable claim which constitutes a preference.

It can hardly be assumed that it was the deliberate purpose of Congress to permit an insolvent to transfer all or a large part of his property to a tort creditor, perhaps one whose claim is embraced within §17, and would not be released by a discharge, and thereby satisfy the tort claim in full, and immediately thereafter file a petition, and having little or no property to be administered in bankruptcy, obtain a discharge from his contract debts,—a result which inevitably follows if tort claims are not provable. It is much more reasonable to conclude that it was intended to put tort creditors and contract creditors on an equal basis with regard to proof, as indicated by a natural construction of §63 a and b, so that the effect of §60 would be to make preferential transfers to each class of creditors within the four month period null and void. If the latter theory is correct, it indicates that both as regards proofs of claim and preferential transfers tort and contract creditors were placed upon an equal footing and the harsh rule set forth in §35 of the Bankruptcy Act of 1867, by which payments or transfers made to tort creditors of an insolvent within the four month period were declared void and their return or refund compelled so that the proceeds might be divided among his contract creditors, is no longer in force.

If the statute is ambiguous, the Court should adopt such a construction of Section 17 as will make it harmonious with Section 1 (11) and Sec-

tions 63a and b, and consistent with Section 60, and the sections can only be harmonized by holding that tort claims are provable.

The cardinal rule of statutory construction is that all the words of a statute should be read together to determine its meaning. If the several sections of the statute relating to a particular subject, when read together, are harmonious, there is no room for construction by the courts, and irrespective of what they may consider the best policy to be, they should give effect to the statute.

Thornley vs. United States, 113 U. S., 310,
at page 313.

Bate Refrigerating Co. vs. Sulzberger, 157
U. S., 1, at page 33.

"It is the duty of courts of justice so to construe all statutes as to give full effect to all the words in their ordinary sense, if this can properly be done; and thus to preserve the harmony of all the provisions."

Bend vs. Hoyt, 13 Peters, 263, at page 272.

"It is the duty of the Court to give effect, if possible, to every word and clause of the statute avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed."

Montclair vs. Ramsdell, 107 U. S., page
147, at page 152.

It is also a settled rule of statutory construction that "prior acts may be resorted to, to solve but not to create an ambiguity."

This proposition was stated in terms by the United States Supreme Court in *Hamilton vs. Rathbone*, 175 U. S., 414, at page 421.

We believe that all the courts which have decided that tort claims are not provable under the Act of 1898 have proceeded upon the erroneous assumption that the Act of 1898, although it differed radically from the prior statute of 1867 in its wording and structure, must be made to conform to the older statute, and after a consideration of the words of the statute in order to justify the conclusion reached, have been obliged to admit, either expressly or by implication, that in Section 17 as amended in 1903, Congress used the word "liabilities" inadvisedly, in order to sustain their construction, and counsel for the trustees was forced to take this position in his brief and on the argument in the Court below.

In other words, the courts deciding that tort claims are not provable under 63b have first determined, independently of the statute, that Congress did not intend that tort claims should be provable and that it therefore followed that Section 63b added nothing to the claims enumerated in Section 63a. Having thus successfully disposed of Section 63b, by refusing to give effect to the words used in their ordinary sense, they then proceeded to consider Section 17 as amended and here met with some difficulty. They then applied the rule of construction that in case of conflict in the provisions of a statute, the section or provisions specifically dealing with the subject will prevail over inconsistent, even if related, sections or provisions to sustain their decision. But this subordinate rule of construction is not applicable in relation to Sections 63a, 63b and Sec-

tion 17, because it can only be here applied by departing from the primary rule of construction that all the words and provisions of a statute must be first considered together and harmonized, if possible, and that only in case they cannot be made to harmonize the subordinate rule of construction above mentioned will be applied. We think that there is no legitimate reason why Section 63b should be stricken down and the natural and normal meaning of its words disregarded for the purpose of *raising* an inconsistency between Section 63 (with "b" eliminated by judicial construction) and Section 17, solely for the purpose of justifying the preconceived idea that Congress did not intend that tort claims not reduced to judgment should be admitted to proof. Following the line of argument of the cases holding that tort claims are not provable, it becomes apparent that it is a very clear illustration of the logical fallacy known as reasoning in a circle.

Such cases as *Brown & Adams vs. United Button Co.*, 149 Fed., 48, therefore violate two of the rules of statutory construction which are enunciated above. They *create* an ambiguity by resorting to prior acts of Congress and depart from the rule that all the words of a statute relating to the subject should, if possible, be harmonized.

A construction which denies tort creditors the right to prove in bankruptcy and denies the bankrupt a discharge from tort claims is inequitable and unjust and if the statute is ambiguous, should be avoided by the Court.

Knowlton vs. Moore, 178 U. S., 41, at page 65.

Unless the statute of 1898 is so plain as imperatively to demand such a construction, it is difficult to see any good reason why a judgment for a tort should be provable and the tort itself, when not reduced to judgment, should not be provable; nor why a tort claim should be admitted to proof or be denied proof solely because of the accident that the claimant has been able to put his claim in judgment before bankruptcy; or why, if his claim is in judgment at the time of the bankruptcy and the trustee, because of some error in the record, prosecutes an appeal and the judgment is reversed, perhaps for some technical reason not going to the merits of the claim, it is too late, after the creditor has obtained another judgment in the same suit, for him to participate in the distribution of property with the other creditors.

It seems most arbitrary that such a distinction should be made under a Bankruptcy Act that contemplates the proof of unliquidated claims, particularly when it is considered that it seems to be well established that a judgment does not change the nature of the claim. In *State of Wisconsin vs. Pelican Insurance Company of New Orleans*, 127 U. S., 265, at pages 292-293, this Court, in considering the effect of a judgment, said:

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay, do not preclude a court to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examin-

ing into the validity of the claim) from ascertaining whether a claim is really one of such a nature that the Court is authorized to enforce it."

It is of course plain that if a tort claim has been reduced to judgment before bankruptcy, no good purpose would be served by a re-examination of the merits of the claim in bankruptcy proceedings. This justifies putting judgments in a class of claims which may be proved and allowed without liquidation and this is all that it justifies.

Claims for pure torts after liquidation subsequent to the bankruptcy should have the same validity as claims reduced to judgment before the bankruptcy. But because they are unliquidated, it is necessary that proceedings for their liquidation should be taken before they are admitted to proof. This justifies deferring their proof and allowance until such liquidation has been had, but it does not justify an exclusion of the claim from proof.

The injustice of denying a tort creditor the right to prove his claim in bankruptcy is most pronounced in the case of tort claims against corporations and is not in any way alleviated by the fact that if a claim is not provable it is not discharged, because corporations rarely, if ever, apply for a discharge. When it is remembered what a large portion of the commercial and industrial activities of the country are directed through the agency of corporations and how in large enterprises injuries to persons and property are regarded as an expense of the business and insured against, and in building and construction enterprises are taken into considera-

tion in fixing the contract price, it is difficult to understand why, if a narrow construction of the statute will defeat proof and a liberal construction will admit proof, the liberal construction should not be followed. It may be noted in this connection that claims for negligence and other tort claims against corporations which cannot avail themselves of the bankruptcy statutes, as railroads, etc., whose insolvent estates are administered in courts of equity, may be reduced to judgment after the filing of the bill and the appointment of a receiver or liquidated in the insolvency proceedings and may afterwards participate in the distribution of the insolvent estate with contract creditors.

Pennsylvania Steel Co. vs. New York City Ry. Co., 165 Fed., 459;
Veatch vs. American Loan & Trust Co., 79 Fed., 471;
Atchison T. & S. F. vs. Osborn, 148 Fed., 606.

If tort claims in general are not provable and therefore not dischargeable under the provisions of the statute, further instances of the imperfect working of the statute, and in fact, the failure of its purpose, are presented. If, as stated by the United States Supreme Court in *Chicago Auditorium Assn. vs. Central Trust Company*, 240 U. S., 581, 591,

"it is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt and to leave the honest debtor there-

after free from liability upon previous obligations,"

how can an honest debtor, who has innocently incurred liability for injury to the person or property of another, ever start afresh unless the Bankruptcy Act makes such liabilities provable and dischargeable? Most persons engaged in commerce or industrial pursuits must employ others and are, under the doctrine of *respondeat superior* responsible for the acts of commission and omission of their employees. However free from fault or honest in his intention and prudent in his acts the bankrupt may be, if a claim against him for injury to the person or property of others not reduced to judgment is not provable and dischargeable, the Bankruptcy Act affords him no relief.

In many instances a tort creditor's claim is more meritorious than a claim for breach of contract. The contract creditor has a choice of knowing with whom he deals and electing to place trust and confidence in him. A tort creditor generally has no such election. The Bankruptcy Act, if finally construed to prevent the proof of claims for injury to the person or property of others, would take away a debtor's property from one class of creditors in order to give it to creditors of another class. An insolvent debtor against whom actions resulting from injury to the person or property of others were pending, knowing that bankruptcy was unavoidable and that he could not be discharged from the claims but only from the judgments, would be very seriously inclined to make no defense, whereupon judgment would be taken by default, perhaps for a large amount, and the judgment-creditor upon

a judgment thus obtained would share equally with all the other creditors. It might be that the bankrupt had a good defense to the claim for personal injury, or that the damages recovered upon his default were excessive, but if the claim had been reduced to judgment and the time to appeal had expired before the appointment of a trustee, and there was no collusion but mere inaction on the part of the bankrupt, there would be no means of righting the injustice to the other creditors.

If tort claims are not provable, there is lacking in the statute the necessary equilibrium between tort and contract claims to give the Bankruptcy Act a uniform operation. It is well established that it is only a transfer or payment to a creditor having a provable claim which constitutes a preference (*Richardson vs. Shaw*, 209 U. S., 365, at page 381; cf. *Clark vs. Rogers*, 228 U. S., 534). This construction is necessitated by the language of the Bankruptcy Act (Sec. 1, Subd. 9; Sec. 60-a).

If tort claims are not provable, an insolvent debtor is justified in surrendering all his property to his tort creditors in satisfaction of their claims and if the value of the money or property received by them is justified by the damages sustained, the transfer or payment cannot thereafter be set aside as a preference even if made on the eve of bankruptcy. After making such a transfer, the insolvent debtor may file a voluntary petition in bankruptcy and receive his discharge and his contract creditors will receive little or nothing. It would also prevent Section 17, exempting certain debts from discharge, from having its full beneficial operation. Under Section 17, liabilities in actions for wilful and malicious injuries to the person or property

of another or for the seduction of an unmarried female, or for criminal conversation are exempted from discharge. The purpose of that exemption is undoubtedly to punish wrong-doers by refusing them a discharge in bankruptcy from the consequence of their wrongful acts. But it hardly seems possible that it was the intention of the framers of the statute that an insolvent debtor on the eve of bankruptcy might take all his property and apply it to the satisfaction of such liabilities created by his own conscious wrong, and after obtaining releases, avail himself of the Bankruptcy Act to obtain a discharge from his contract indebtedness. This consideration emphasizes the close relationship of Section 17 to Section 63.

It has sometimes been urged that the liquidation of tort claims would be onerous in a bankruptcy proceeding and that the bankruptcy courts are not constituted for the liquidation of such claims. A claim for personal injury or injury to property is no harder to liquidate than a claim for breach of promise of marriage or for unliquidated damages for breach of contract, and the fact that damages for an anticipatory breach of contract might be difficult of liquidation did not deter this Court in *Central Trust Co. vs. Chicago Auditorium Assn.*, 240 U. S., 581, from holding that a claim of that nature was provable.

It may be answered that if the Bankruptcy Act is thus full of anomalies and hardship and injustice in particular instances which prevent it from having the operation intended, i. e., "to permit all creditors to share in the distribution of the assets of the bankrupt and to leave the honest debtor thereafter free from liability upon previous obli-

gations," an appeal should be made to Congress to amend the Statute. But why should the Statute be amended before it has been interpreted by this Court, whose authority is alone controlling, when, adopting the general rule of statutory construction, that all the words in a statute should be construed together and so far as possible the words used should be given their natural, normal meaning, the glaring anomalies are avoided and the sections of the statute constitute a harmonious whole?

The Bankruptcy Act of 1898 marked a departure from the legislative policy of the former bankruptcy laws to meet changed conditions.

All the older bankruptcy statutes were framed with particular reference to traders (Leidigh Carriage Company vs. Stengel, 95 Fed., 637, at pages 646-647; C. C. A. Sixth Circuit per Taft, J.) and the Bankruptcy Act of 1867 assimilated to some extent the characteristics of the older traders' statutes (In re Lachemeyer, Fed. Cas. 7966). Moreover, as we have pointed out above, the bankruptcy statute of 1867 following the English bankruptcy acts contained a provision which expressly provided against the proof of tort claims.

The Bankruptcy Act of 1898, however, has lost the characteristics of a traders' statute. Under the present Act it has been held that claims for breach of promise of marriage are provable (*In re Fife*, 109 Fed., 880; *In re McCauley*, 101 Fed., 223), and in the absence of the element of seduction are dischargeable. Judgments for all kinds of torts, including claims for negligence of the bankrupt or

imputed to him, for assault and battery, libel and slander, nuisance, fraud, criminal conversation and seduction are provable (*Tinker vs. Colwell*, 193 U. S., 473; *In re Freche*, 109 Fed., 620). Damages for anticipatory breach of a contract where the contract has not been broken before the bankruptcy and the bankruptcy itself is relied upon as a breach, are provable (*Chicago Auditorium Assn. vs. Central Trust Company*, 240 U. S., 581). The latter case overruled decisions in many of the circuits and marked a distinct advance in the law.

The courts which have decided that Section 63b does not permit the proof of tort claims have proceeded upon the assumption, which we believe to be erroneous, that it was not intended by the statute of 1898 to allow proof of claims which would not have been provable under the former Bankruptcy Act of 1867 and "would * * * involve a wide departure from the settled policy of every system of bankruptcy heretofore enforced in the United States."

(See *in re United Button Co.*, 140 Fed., 495, at page 500.)

These courts and the court below have not taken into consideration the fact that the bankruptcy law of 1898 in its structure and wording, so far as it relates to what claims are provable in bankruptcy, represents such a wide departure from the former law that decisions under it are inapplicable. The period of thirty-one years elapsing between 1867 and 1898 marked a greater change in the commercial and industrial life of the country than any similar period in its history and Congress was in-

deed unresponsive to the changes which had occurred since the repeal of the former bankruptcy act if it did not write into the statute the necessary provisions to meet the growing needs of the commercial and industrial world existing at the time of its adoption.

To Summarize:

I. Sections 1 (11), 17 and Sections 63a and b of the Bankruptcy Act of 1898, when read together, are plain and unambiguous and permit the proof of tort claims in bankruptcy.

II. If Sections 1 (11), 17 and Sections 63a and b be regarded as ambiguous, applying the recognized rules of statutory construction, the ambiguity should be resolved in favor of the provability of tort claims:

(a) To give full effect to all the words of those sections.

(b) To comply with the rule of *noscitur a sociis*.

(c) To give effect to the rule that the legislative construction placed upon a statute is binding upon the courts.

(d) To give a construction to the statute conformable to equality and justice:

1. By admitting tort claims as well as contract claims to proof and thereby preventing the injustice of taking away the bankrupt's estate from tort creditors who have not reduced their claims to judgment and giving it to contract creditors.

2. By giving tort creditors of corporations a right to participate in the distribution of the corporation's bankrupt estate which would

otherwise be completely extinguished and all rights of future recovery lost.

3. To prevent a bankrupt who, by reason of his conscious wrong is liable upon a claim which is exempted from discharge by Section 17 of the Bankruptcy Act, from making a transfer of his property in satisfaction of that claim in contemplation of bankruptcy and filing a petition and obtaining a discharge from his other liabilities.

4. To give full effect to the purpose of the Act which has been declared by the Supreme Court to be "to permit all creditors to share in the distribution of the assets of the bankrupt and to leave the honest debtor thereafter free from liability upon previous obligations."

POINT V.

The liability of Albert LeMore and Edward E. Carriere being predicated upon their conscious, criminal participation in the frauds, it is immaterial whether the claims are presented as claims in tort for fraud or as claims upon an implied or quasi contract or equitable debt. In any event, the petitioners are entitled to prove their claims both against the firm estate and against the individual estates of the partners.

Members of a partnership are severally (as well as jointly) liable for frauds practised in connection with the conduct of the firm business.

22 *Am. & Eng. Encyc. of Law*, page 171.

"The liability of partners for loss occasioned by any wrongful act or omission, or for the misapplication of money or property for which the firm is liable, is, as a general rule, joint and several, as is also their liability for any breach of trust imputable to the firm," citing many cases.

Lindley on Partnership (8th Ed.), page 821.

"Breaches of trust and frauds imputable to a firm place the *cestuis que trustent* and defrauded creditors in the position of joint and several creditors."

It follows that where the liability of partners is several, whether arising out of contract or not, separate proofs of claim in bankruptcy may be made against the individual estates of the partners and dividends allowed from those estates.

Black on Bankruptcy, Sec. 129.

In re McCoy, 150 Fed., 106.

In re Coe, 169 Fed., 1002; *aff'd* 183 Fed., 745.

In re Blackford, 35 App. Div., 330.

In re Baxter, 18 N. B. R., 62 (Fed. Cas. No. 1119).

In re Jordan, 2 Fed., 319.

In re Parkers, 19 Q. B. D., 84.

In re McCoy, 150 Fed., 106 (C. C. A., 7th Circuit), was a case where promissory notes were signed by a firm and by the individual partners, the proceeds of the transaction going into the partnership business. It was claimed that the transaction was a partnership transaction, and that proof could only be allowed from the partnership estate and not from the individual estates. The Court held, however, that claims might be proved against the individual estates, as well as against the partnership estate.

An appeal was taken to the United States Supreme Court, but the appeal was dismissed (*Chapman vs. Bowen*, 207 U. S., 89), and this Court, in passing upon the decision of the court below, said:

"The decision below proceeded on well settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act."

In *In re Coe*, 169 Fed., 1002 (affirmed 183 Fed., 745), certain ostrich feathers covered by trust receipts securing the payment of acceptances drawn against the shipment of feathers had been converted by the co-partnership of Cadenas & Coe. The firm offered a composition and the creditor received and accepted the composition dividend. It afterwards proved its claim against the separate estate of Coe (one of the partners) and although it did not appear that Coe had personally profited by the conversion of the feathers or that he had personally participated in the conversion, the claim was allowed against his separate estate. The District

Court held that the members of the firm were jointly liable upon the acceptances and were jointly and severally liable in quasi contract for the conversion.

On appeal to the Circuit Court of Appeals, Second Circuit, that Court in affirming the order, 183 Fed., 745, said at page 747:

"The bank could prove two claims, one against the firm, i. e., the partners jointly on the acceptances, and the other against the partners jointly and severally upon an implied contract (the tort being waived) to repay moneys of the bank wrongfully converted by them. The doctrine of election between inconsistent remedies on the same claim has no application."

These decisions announced no new rule of law, but followed many carefully considered decisions, both in the United States and England.

Matter of Peck, 206 N. Y., 55. A firm of stock brokers converted shares of stock left in their possession as collateral security, and a judgment was obtained against the members of the firm. The company made a general assignment for the benefit of its creditors and the holder of the judgment filed a proof of claim both against the partnership estate and against the individual estates of the partners. The Court held that the claims were proper and that separate proof could be made against the assets of the partnership and the assets of the individual partners and stated that

the equitable rule of marshaling did not prevent the allowance of the separate claims. The Court said, page 62:

"The individual liability of a member of a partnership arising by operation of law through a tort for which the individual members of a partnership are liable is equally binding in equity upon the individual assets of such partner as if the individual liability had arisen from an express contract apart from the contractual relation arising from the partnership."

Matter of Peck (*supra*) was cited with approval by this Court in *McIntire vs. Kavanaugh*, 242 U. S., 138.

Re Pierson, 19 App. Div. (N. Y.), 478-483. Stock brokers held certain stocks in pledge and converted them by an unlawful pledge. The owner obtained the proceeds of such stocks as remained and then presented his claim against the executor of a deceased partner "as an individual indebtedness of such deceased member, arising out of his tortious act in the pledging of their stocks." The decedent's estate was insolvent but the Court nevertheless held that it was individually liable for the conversion committed by the partners, and that the claim based on the conversion must share in dividends equally with the individual creditors.

City Bank vs. Park Bank, 32 Hun (N. Y.), 105, was a case of "joint conspiracy to defraud," by which the wrongdoers realized money, and the Court held that the injured party might "waive

the tort and proceed upon the implied contract to repay the money obtained by the fraud" and that this quasi contract liability could be set up as a counterclaim against one of the wrongdoers suing alone.

See page 111.

"We think the implied contract in such case which arises upon waiver of an action for tort is joint and several and not joint alone. Such was the nature of the tort and each party could have been separately sued upon it, and the same reason extends to the implied contract. Either conspirator may be sued upon his implied promise and be made to answer for the whole of the money obtained by the fraud consummated under the conspiracy."

Terry vs. Munger, 121 N. Y., 161, 171.

Re Blackford, 35 App. Div., 330.

Loveland on Bankruptcy, 315 and cases cited.

Russell vs. McCall, 141 N. Y., 437, was a case of misappropriation by partners, one of whom died, and the court of equity held the survivor individually liable to restore the amount misappropriated, holding on full argument that this implied contract obligation to make restitution was a joint and several obligations upon which proceedings might be taken (and in the case in question actually were taken) against each partner separately. In *Sadler vs. Lee*, 6 Beavan, 324, the Court al-

lowed separate proof in a waiver of tort case against an individual partner's estate.

Re Vetterlein, 20 Fed., 109 (Southern District of New York). Here the United States was allowed to prove against each separate estate and also against the firm estate, its claim for forfeiture because of fraudulent undervaluations. Judge Brown says: "Claims of the kind here referred to are both joint and several."

Lovcland on Bankruptcy, 315, says, that separate and simultaneous proofs against the firm and the individual partner may be made and double dividends received in various cases of wrongful use of trust funds, misappropriation, etc.

Re Blackford, 35 App. Div., (N. Y.), 330, Cullen, J., writing. A judgment was entered against a partnership for a tort, wrongful taking and detention of property, and the firm became insolvent. The Court held that notwithstanding the joint judgment and notwithstanding the rule of marshaling, which holds that the firm assets shall be primarily for firm creditors and the separate assets for separate creditors, the judgment might be proved against the individual estate of one partner *pari passu* with the individual creditors. Judge Cullen says that though the judgment "arose out of partnership transactions, the liability of the parties was joint and several," and not merely joint or several, and that the case is the same as if the partner has individually pledged his property or responsibility for a firm debt, and concludes as follows, page 333:

"In this State where a liability is both joint and several, the creditor has the right to en-

force both liabilities. * * * Nor do we see that the liability of joint tort-feasors is different from that of parties to a contract by which under its express terms they become jointly and severally bound. The principle on which equity founds the rule that joint creditors must look to the joint estate and individual creditors to the separate estate of the partners, is that the joint creditors have extended credit on the faith of the firm property and the individual creditors on the faith of the separate estates of the partners. This reasoning certainly does not obtain in a case like the present in which there was no contractual relation between the parties and the act of the defendant was a tort pure and simple."

Matter of Blackford (*supra*) was cited with approval and followed by the New York Court of Appeals in the later case of Matter of Peck, 206 N. Y., 55.

Re Parkers, 19 Queens Bench Div., 84, was a case of improper use of funds and the court allowed double proof against the firm estate and the individual estate in bankruptcy under the English Statute modifying the rule of election.

The subject is very well summed up in *Black on Bankruptcy*, §129, as follows:

"There are some instances in which a creditor will be entitled to prove his claim against both the bankrupt partnership and the several members of the firm, and to receive dividends from both sources until satisfaction. Thus, a creditor who holds commercial paper made by

the bankrupt firm and indorsed by an individual member of the firm, also a bankrupt, may prove his debt against both estates and share in the dividend of each. For he would have a right of action against each, though entitled to only one satisfaction. * * *

But generally speaking, a joint and several obligation given by a partnership is also provable as an individual obligation against the estate of either of the parties. A joint and several note, given for money borrowed by a firm and signed in the firm name, with other names following, may be proved against the joint assets of the firm; but not one which is signed individually by certain of the partners and by others as sureties. On similar principles, where one member of a firm, with the knowledge and assent of his co-partners, misappropriates trust funds (as, the money of an estate of which he is executor, or the money of a corporation of which he is the treasurer or agent) and invests the same in the business of the firm, the obligation thus created is both joint and several; and proof of the claim may be made against the partnership as well as against the individual partner. A parallel rule applies to the case of a liability to the United States incurred by a fraudulent valuation of goods entered at the custom house; the claim of the government against the firm for the tort is joint and several and may be proved against both estates. And in general, and notwithstanding some vigorous dissent, the rule may be said to be fairly well established that the commission of a tort by

a partnership makes the partners also jointly and severally liable, and the party injured may prove his claim both against the estate of the firm in bankruptcy and against the separate estates of the partners."

The great weight of American authority is, therefore, to the effect that proof will be allowed both against the firm estate and the individual estates of the partners for frauds and breaches of trust committed on behalf of a partnership. The only American authority seemingly to the contrary is *Reynolds vs. New York Trust Company*, 188 Fed., 611. But when the opinion of the Court in this case is analyzed, it clearly appears that it does not militate against the proof of separate claims in the case at bar, but inferentially supports the right to such proof.

In the Reynolds case it appeared that the firm of E. H. Gay & Company had made a tortious conversion of certain bonds of the creditor, the New York Trust Company, which they had held as bailees. E. H. Gay & Company were subsequently adjudicated bankrupts. The New York Trust Company presented a claim against the partnership, alleging a delivery of the bonds and its failure to re-deliver. It also presented a claim against the individual estate of E. H. Gay. The matter was brought before the Court upon stipulated facts among which was the statement that "no attempt is made to show that the unauthorized pledge was the individual act of E. H. Gay." The Court held that inasmuch as E. H. Gay did not participate in the conversion of the securities,

proof could not be made against the firm estate and his separate estate in bankruptcy.

Reference to some of the English cases will show the theory on which the Reynolds case was decided and will also show how the Reynolds case is differentiated from the case at bar.

In England it seems now to be well established that separate proof can only be made in cases where fraud has been perpetrated in the interest of a partnership against the estates of the individual partners who have participated in the fraud. Thus, in *ex parte Adamson*; in *re Collie*, 8 Chancery Division, 807, the Court said:

"This right to go against the partnership assets did not relieve the guilty party or parties of his or their personal and separate liability by reason of his or their actual participation. If in a partnership of A, B, C and D and in a partnership matter A and B shared in a fraud upon a customer, they would be severally liable and the joint estate would be liable to make restitution, but not the separate estates of C and D."

In re J. and H. Davison, *ex parte Chandler*, 13 Q. B. D., 50, proof was sought to be made against the individual estate of H. Davison one of the partners. It appeared on the hearing that a judgment had been entered against the partners jointly and proof was denied in the lower court on that ground. On appeal it was held that the creditor did not lose his right to make separate proof because of the entry of the judgment and sent the case back for further proof of the participation of

the partner against whose separate estate proof was sought to be made. The Court said:

"The respondents must establish a separate cause of action against H. Davison; but as the proof was rejected upon a preliminary objection which has failed and the merits have never merely been discussed, I think the proper course would be to discharge the order of the court below, to declare that the trustee was not justified in rejecting the proof on the ground taken by him, or on the ground taken before me, and that the respondents are entitled to prove against the separate estate of H. Davison, if they can establish a separate cause of action against him, as for instance, that he misappropriated or was party to a misappropriation of the respondents' money; for it is, of course, possible that although the money may have been misappropriated, it was misappropriated by the other partner alone in fraud of H. Davison, in which case there would be a separate cause of action against the other partner but not against H. Davison, and in that case the respondents will not be able to prove against the separate estate of H. Davison."

These cases, therefore, lay down the rule that for the purposes of separate proof in bankruptcy, the fraud of one partner will not be imputed to a co-partner and that the creditor can prove only against the estate of the partner or partners implicated in the fraud. This was the doctrine relied on by the Circuit Court of Appeals in the

Reynolds case, as plainly appears from the following excerpts from the opinion of the Court, 188 Fed., 611 et seq.:

Page 613:

"The claim against the individual estate of E. H. Gay is based solely upon the theory of an implied contract or quasi contract arising from the conversion of the bonds by E. H. Gay & Co. in the course of the firm business.

"By its terms the claim against E. H. Gay individually alleged a conversion of the bonds by E. H. Gay. This allegation, however, becomes immaterial since the stipulation provides that no attempt is made to show that the unauthorized pledge was the individual act of E. H. Gay and since it does not appear that E. H. Gay individually received benefit therefrom. * * *

"The additional several contract of a partner is not implied from the firm transaction, but must be created by a distinct act of the co-partner.

"As the conversion in the present case was by the firm, in the course of the firm business, as the actual participation of E. H. Gay is not proved, as there is no evidence that his individual estate benefited by the firm conversion—there is difficulty in finding any substantial ground upon which to imply from the circumstances a separate contract of E. H. Gay which corresponds to an express individual contract to answer for a firm debt. * * *

Page 614:

"The claim against E. H. Gay is based entirely upon the fact, stated in the stipulation though not in the claim, that the co-partnership converted the bonds. * * *

Page 619:

"If on principle the doctrine of quasi contracts is broader in scope than the action for money had and received, and should be extended to all cases in which a defendant has had that for which in conscience he should give the plaintiff an equivalent in money (Keener, 195), yet in the present case this reason applies only to the firm *and not to the individual who was not an actual participant, nor beneficiary.*

"Under such conditions the rule that forbids contribution between wrong-doers abates, and the right arises to recover from the actual wrong-doer the damage imposed upon one who is not in fact a participant; *the ultimate responsibility being cast upon the actual wrong-doers.* * * *

"Whether in any event the right to contribution would not cast this claim ultimately upon the partnership estate, under Chapter 3, section 5g, though a claim of the individual estate is a query which we need not solve, but simply refer to as a possible complication that might result from implying a contract against one who is held liable as a tort-feasor *without actual participation or moral responsibility.*" (Italics ours.)

It appearing in the Reynolds case that the individual partner against whose estate separate proof was sought to be made had no participation in the wrongful act and no "moral responsibility," the decision in that case amounts to no more than the adoption of the rule laid down by the English courts in the cases of *In re Adamson*, *supra*, and *In re Davison*, *supra*.

In the case at bar it is clear that the estates of the individual partners have no right to contribution from, or exoneration by, the firm estate. The individual partners were guilty of criminal, conscious frauds, and neither they nor their estates in bankruptcy have any rights of contribution.

The English doctrine of election has been repudiated by the American cases.

It is true that under the English cases where members of the firm obtained moneys by fraud which found their way into the partnership funds, the creditor was put to an election between proving against the firm estate or against the individual estate of the partners participating in the fraud. (*In re Adamson*, *supra*.) But this rule of election was applied in cases of joint and several contracts as well as the joint and several claims arising out of frauds and breaches of trust and was and is a purely arbitrary rule. (*Ex parte Moulton*, 1 L. J. Rep., N. S., Part I, Bankruptcy, 26; *ex parte Hinton*, De Gex's Bankruptcy Report, 552; *Goldsmid vs. Cazenove*, 29 L. J. Rep., N. S., Part I, Bankruptcy, 17.) It was never adopted in the United States, having been repudiated by the Federal courts in decisions rendered under the early bank-

ruptcy statutes and has now been modified to some extent in England.

The English rule and the authorities and reasons upon which it is based are carefully reviewed in the opinion of the Court *In re Farnum* (Federal Case No. 4674). The rule was not followed in that case.

The English rule is stated in *Story on Partnership*, Third Edition, Section 384, at page 609, but is severely criticised by the learned author in the two following sections (Sections 385 and 386) :

"385. The doctrine thus established does not any more than the preceding, seem to stand upon any solid ground of equity or general reasoning. It has been supported upon some supposed analogy to the rule of law in cases of this sort, where the creditor may sue all the partners at law, and have a joint execution against all, or he may sue each partner separately at law, and have a separate execution against each. But he cannot do both; that is, he cannot at law at the same time sue them all in a joint action, and each one separately in a separate action; but he will be put to an election of his remedy by the very forms of pleading. And it is added, that the general nature of the bankruptcy law is to provide for the payment of all debts equally, as in conscience all are equal; and equality is equity."

"386. Now (to say the least of it) this is assuming the very ground of controversy, and not establishing it by any satisfactory reasoning. With what justice can it be said, that the contract, which is merely joint or merely

several, shall stand upon an equal footing, as to right and remedy, with one that is both joint and several? The very object of the law is to provide a superior remedy to enforce it, and why should any court deprive the creditor of the very benefit which the debtors had stipulated to give him, or to restrain him from using all his rights? * * *

The later American decisions followed the reasoning of Justice Story's criticism and repudiated the doctrine of election in many cases under former bankruptcy acts.

In re Farnum (Fed. Case No. 4674) was decided under the Act of 1841. The English authorities are reviewed in a careful opinion and the conclusion reached that the English doctrine of election does not prevail in this country. This is a leading case because it was the forerunner of many other cases under the Act of 1867, which repudiated the doctrine of election.

Mead vs. National Bank of Fayetteville, 6 Blatch., 180 (Fed. Case No. 9366), was decided under the Act of 1867. The Court approved the conclusion reached *In re Farnum* and the criticism of the English rule by Judge Story.

In re Bigelow, 3 Ben., 146 (Fed. Case No. 1397), *In re Farnum* and *Mead vs. National Bank of Fayetteville* are followed in repudiating the English doctrine of election and in permitting the creditor to make double proof.

In re Bradley, 2 Biss., 515 (Fed. Case No. 1772), follows the ruling of *In re Farnum*, *Mead vs. National Bank of Fayetteville* and *In re Bigelow*.

In re Howard (Fed. Case No. 6750) the Court followed *In re Farnum*, *Mead vs. National Bank of Fayetteville* and *In re Bigelow*, and while recognizing that the doctrine of election was applied in England, approved Judge Story's criticism of the rule.

Emory vs. The Canal National Bank, 3 Cliff., 507 (Fed. Case No. 4446), contains a review by Justice Clifford of the English cases requiring election and says of that rule (page 647):

"Beyond doubt the opposite rule was the old rule in England; but it was never adopted in this country, and was expressly repudiated by Judge Sprague in *Ex parte Farnum* in an opinion of great research and ability. * * * Attention is very properly called to the fact that he was expounding the Bankruptcy Law of 1841; but it is as true now as it was then that the old rule has never been adopted in this country."

In re Baxter, 18 N. B. R. Rep., 62, held that double proof against the firm and the individual estate was proper where corporate moneys had been wrongfully used in the business of the firm by one of the partners who was an officer of the corporation. The Court said:

"The firm of Archibald Baxter & Co. having taken the funds with knowledge that they were not entitled to receive the same, are equally liable to the corporation with Baxter personally, and, on the authority of *Emory vs. Canal National Bank* (7 N. B. R., 217), I think proof can be made against both estates."

Re Jordan, 2 Fed., 319, where the claimant's moneys were wrongfully put into the firm business and used, the Court held that double proof might be made against the individual estate and the joint estate and double dividends allowed, saying, after full discussion and citation of many cases:

"By the entries upon the firm books of the various sums thus paid to the firm his copartner, Blake, became cognizant of the transaction and the firm thereby became chargeable as trustees for the amount thus loaned to the firm by Jordan as administrator. In England there is a uniform current of authorities that when trust funds are thus misappropriated and loaned by an executor or trustee under a will to a firm, with the sanction of its members, this amount constitutes a joint and several claim, provable against the firm and the individual members of the firm who have knowledge of the transaction. Under the law, as it was formerly declared in England, and so long as double proof was not permitted, it might be that the creditor was put to his election whether to proceed eventually against the firm estate or that of its members, though at the present day, since the Act of 1869 it may be that double proof might now be permitted. *No such question of election can here arise, as our Bankrupt Act and the decisions of the courts here allow of double proof in cases where a joint and several liability exists.*" (Italics ours.)

In re Blackford, 35 App. Div., 330, a decision repudiating the English rule of election, says:

"But the rule has been the subject of grave attack on principle (Story Part., §376; Borden vs. Cuyler, 10 Cush., 476) and does not seem to obtain in this country (*the American practice in bankruptcy is the exact reverse*" (citing cases). (*Italics ours.*)

It will thus be seen that under the former bankruptcy acts there is a uniform current of authority to the effect that in cases of frauds and breaches of trust, as also in cases of joint and several contract claims, the doctrine of election was repudiated by the American courts and double proof was permitted to be made.

POINT VI.

The petitioners' right to prove against the firm assets and also against the individual assets of the partners is established by well settled principles of general law and is not affected by the provisions of Sections 5-f and g of the Bankruptcy Act.

Section 5-f of the Bankruptcy Act is in its provisions substantially similar to corresponding provisions which have been contained in the English Bankruptcy Law for over one hundred years.

The corresponding provision in the present English Act (The Bankruptcy Act, 1883), Section 40 (paragraph 3) is as follows:

"In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective estates in proportion to the right and interest of each partner in the joint estate."

In commenting upon this section of the English statute, Williams' Bankruptcy Practice, 10th Edition, at page 189 says:

"Sub Section 3 embodies the rule as to the distribution of joint and separate estates laid down by Lord King in *ex p. Cook*, 2 P. Wms., 500, which was as follows: 'that joint creditors shall be paid first out of the partnership or joint estate and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate besides what will pay the joint creditors the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors.'

"It was upon this rule that Lord Loughborough's celebrated order was founded, which was as follows: 'And I do further order that the Commissioner do cause distinct accounts

to be kept of the joint estate, and also of such separate estate or estates; and that what shall be found to belong to the separate estate or estates shall be applied, in the first place, in or towards satisfaction of the debts of the respective separate creditors; and in case there shall be any overplus of the joint estate, after all the joint creditors shall be paid and satisfied their whole demands, that the share or shares, interest or interests of the bankrupt or bankrupts, whose separate estate or estates is or are to be applied in manner before directed, in such overplus be carried to the account of his or their separate estate or estates, and be applied in or towards satisfaction of his or their separate debts: and in case there shall be any overplus of the separate estate or estates of such bankrupt or bankrupts, after all their separate creditors shall be paid and satisfied their whole demands, that the surplus of such separate estate or estates be carried to the account of the joint estate, and be applied in or towards satisfaction of the joint debts; and that the costs of taking such accounts be paid out of such separate estate or estates and be settled by the Commissioner, in case the parties differ about the same' (Order, 6th March, 1794, 1 Mont. & Ayr., 454)."

The English Courts in bankruptcy, however, have never construed this statute as operating to prevent a creditor from proving against the separate estate of a partner when the partner was guilty of individual participation in or privy to a fraud practiced in the interests of the partnership.

The rule applied in England but repudiated here whereby creditors having joint and several claims in contract or for frauds or breaches of trust were required to elect between proof against the firm assets or against the assets of the individual partners, is entirely independent of the rule of marshaling and is not statutory in its origin, and where a partner's liability for frauds or breaches of trust, although connected with a partnership, was several, proof was allowed against his individual estate, the right to make such proof against the individual estate not being deemed to be in any manner affected by the statutory provision regarding the marshaling of assets of the firm and its individual partners (*Ex parte Adamson*; *In re Collie* (supra); *In re J. and H. Davison*; *Ex parte Chandler* (supra)). For more than a century therefore, the English Courts have recognized and enforced substantive rights as to proof against the firm or individual members of the firm and have applied the statutory provision governing marshaling of firm and individual assets after such rights have been determined by their general principles of law.

Section 14 of our Bankruptcy Act of 1841 contained a provision similar to Section 5-f of the present Bankruptcy Act and similar also to the provisions of the English Bankruptcy Acts and was as follows:

"And the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees

the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors, and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective right and interest therein, as it would have been if the partnership had been dissolved without any bankruptcy, and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; * * *."

Section 36 of the Bankruptcy Act of 1867 was almost literally a copy of the provisions above quoted from Section 14 of the Bankruptcy Act of 1841, the two statutes being so nearly identical in wording as to make it unnecessary to quote the words of the 1867 statute.

This Court has held that the legal effect of the corresponding provisions of the Acts of 1841, 1867 and 1898 relating to marshalling assets of a firm and the individual partners thereof is precisely the same so that an authoritative construction of any of the earlier Acts relating to these provisions would be binding as to the provisions of the pres-

ent Act (*Farmers & Mechanics Bank vs. Ridge Avenue Bank*, 240 U. S., 498, at page 505).

There is an unbroken current of authority under the earlier Bankruptcy Acts establishing that the substantive rights of creditors to make proof where a firm and its individual members are jointly and severally liable upon an express contract or in quasi contract is not affected or impaired by the provisions in the earlier Acts corresponding to Section 5-f of the present Bankruptcy Act (*In re Farnum*, Fed. Cas. No. 4674; *Mead vs. The National Bank of Fayetteville*, Fed. Cas. No. 9366; *In re Bigelow*, Fed. Cas. No. 1397; *In re Bradley*, Fed. Cas. No. 1772; *In re Howard*, Fed. Cas. No. 6750; *Emory vs. The Canal National Bank*, Fed. Cas. No. 4446; *In re Baxter*, 18 N. B. R., 62; *re Jordan*, 2 Fed., 319).

It follows that the enactment of the same general rule in the Bankruptcy Act of 1898 justifies the conclusion that it was the legislative intent that the Statute of 1898 should bear the same construction as the corresponding provisions of the earlier Bankruptcy Acts.

Farmers & Mechanics National Bank vs. Ridge Avenue Bank, 240 U. S., page 498, at page 505.

Indeed, this construction has had the sanction of this court (*In re McCoy*, 150 Fed., 106; *Chapman vs. Bowen*, 207 U. S., 89).

In the McCoy case two notes given in a firm transaction were signed by the firm of A. McCoy & Co. and by the individual names, Alfred McCoy and Thomas McCoy. The firm and the partners

went into bankruptcy and the creditor filed proofs of claim against the firm estate and against the individual estate of Alfred McCoy. The claim was disallowed by the referee whose decision was affirmed by the District Court. The opinion of the District Court appears in 150 Fed., at pages 109 and 110 and justifies the rejection of the claim upon grounds substantially similar to those relied upon by the Circuit Court of Appeals in the case at bar, the Court relying upon the provisions of Section 5F of the Bankruptcy Act to defeat the proof against the individual estate of Alfred McCoy.

The order of the District Court was reversed by the Circuit Court of Appeals, 150 Fed., 106. The Circuit Court of Appeals considered the provisions of Section 5F of the Bankruptcy Act and said:

"This provision was not intended as we look at it to modify in any respect, the pre-existing law. * * * The claim disallowed, was not a claim for the payment of a partnership debt out of the individual estate. Had it been, the disallowance would have been proper; for both under the section of the Statute and under the pre-existing law, any surplus remaining after the payment of individual debts would have been added to the partnership assets and thereby have become available to the payment of appellant's debt. The claim disallowed, was a claim for McCoy's individual debt—as much so as if McCoy had individually on a separate piece of paper, obligated himself for this debt. And because it is his individual debt it is provable under the section cited as well as

under the general law, against his individual estate * * *. In England the old rule was, that in administering the bankrupt laws of that country double proof against the partnership estate and the individual estate of the partners was not allowed. But this rule has not been followed in this country (*Emory vs. Canal National Bank*, Fed. Cas. No. 4446, *Bumps Bankruptcy* (5th Ed.), page 198; *In re Bradley*, Fed. Cas. No. 1772; *In re Farnum*, Fed. Cas. No. 4674; *Mead vs. National Bank of La Fayette*, 6 Blach., 180, Fed. Cas. No. 9366; *In re Bigelow*, 3 Ben., 146, Fed. Cas. No. 1397); and there is nothing in the Bankruptcy Act showing that this English rule was intended to be embodied in our Act. Indeed, it is doubtful if the old rule is now in force in England."

The Trustee in Bankruptcy then appealed to this Court but did not obtain a certificate of a justice of this Court that in his opinion the determination of the question involved in the allowance of the claim was essential to a uniform construction of the Act throughout the United States. A motion was made to dismiss the appeal and it was contended by the Trustee that he was claiming a right under a Statute of the United States but this Court said:

"The decision below proceeded on well settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act."

Accordingly, we have the decision of this Court to the effect that where claims against a firm and its individual members may be made separately on well settled principles of general law double proof may be made in bankruptcy and the provisions of 5-f do not operate to defeat proof of such a claim.

It is therefore clearly established both in the courts of England and of the United States that the similar statutory provisions common to both jurisdictions governing the marshalling of partnership and individual assets do not affect the right to make double proof when the firm is jointly and the individual partners are severally liable under "well settled principles of general law."

The Circuit Court of Appeals, in affirming the order of the District Court, relied upon the decisions of this court in two cases. (*Miller vs. New Orleans Fertilizer Co.*, 211 U. S., 496, and *Farmers Bank vs. Ridge Avenue Bank*, 240 U. S., 498.) Both of these cases deal with questions of marshalling purely, and in each case the point decided and the matters discussed by this Court in its opinion was confined to the narrow point involved.

In the case of *Miller vs. New Orleans Fertilizer Company*, this Court held that the provisions of the Bankruptcy Act with respect to marshalling assets between firm and individual creditors would prevail over inconsistent provisions of the Louisiana Code, whereby firm creditors participated on an equal footing with individual creditors in the distribution of the individual estate of the bankrupt partners.

Farmers Bank vs. Ridge Avenue Bank, 240 U. S., 498, decided that where a partnership is insolvent and each individual partner is also insolvent, and the only fund for distribution is produced by the individual estate of one member, the individual creditors of that member are entitled to priority in the distribution of the fund over the firm creditors. This result was reached by considering that the rule of marshalling set forth in Section 5-f of the Bankruptcy Law is merely an enunciation of the general rule as applied in courts of equity in this country and in England; that the exception to the rule indicated by the English cases, viz., that where there were no firm assets and the only fund for distribution was the assets of an individual member, the firm creditors would participate with the individual creditors in the distribution of the assets of the individual member of the firm, —was based upon a defect in the practice of the English equity courts, which enforced the principle of marshalling by an order requiring separate accounts; but held that where there were no separate estates, this order could not be made and there was no method of enforcing the rule. This Court pointed out that this defect in practice was provided for by Section 5-g of the Bankruptcy Act which fully met the situation.

Neither of these cases involved any question of double proof and it requires a liberal exercise of the imagination to apply anything in them to the questions involved in the case at bar.

We believe, however, that the decision of the Court in *Farmers Bank vs. Ridge Av. Bank*, *supra*, recognized that the Bankruptcy Act did not change the general equity rule as to marshalling assets of

the partnership and of the individual partners, but only provided an instrument, if one were needed, to carry the rule into full effect, and that Section 5 was not intended to introduce any new and radical rule of marshalling assets.

LASTLY.

The judgment appealed from should be reversed and the claims filed against the separate estates of Albert LeMore and Edward E. Carriere should be allowed.

Respectfully submitted,

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No 84

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Supreme Court of the United States

OCTOBER TERM, 1919.

WILLIAM SCHALL, et als.,
Petitioners,
against

FREDERICK CAMORS, et al., Trustees of Estates
of Albert LeMore and Edward E. Carriere,
Bankrupts,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

RALPH S. ROUNDS,
Attorney for Petitioners.

RALPH S. ROUNDS,
EUGENE CONGLETON,
of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1919.

WILLIAM SCHALL, et als.,	}
Petitioners,	
against	
FREDERICK CAMORS, et al., Trustees of Estates of Albert LeMore and Ed. E. Carriere, bankrupts,	}
Respondents.	

PETITIONERS' REPLY BRIEF.

I.

The claims filed by Muller, Schall & Company against the separate estates of Albert LeMore and Ed. E. Carriere are provable as equitable debts.

The respondents have taken entirely too narrow a view as to the provability of claims arising out of fraud or breaches of trust. They make an

argument similar to that made by the appellants in *Clarke vs. Rogers*, 228 U. S., page 543, to show that the petitioners could not have entertained separate actions in assumpsit against the individual partners and that their claims are therefore not provable. Whether they can be or not, such claims are clearly provable as equitable debts.

The authorities sustaining the right to make double proof in bankruptcy against a firm and the individual partners make no distinction between cases of fraud and cases of breach of trust, because every person who obtains money or property by fraud and every person who misappropriates money or property already lawfully in his possession is treated in equity as a constructive trustee of such property and is held to account in the same manner in both classes of cases.

Perry on Trusts (Fifth Edition), in the chapter on Constructive Trusts, points out that the remedies given by a Court of Equity in fraud cases are the same as those given in cases of breaches of trust, and says (Vol. 1, page 228) :

"Courts of equity by raising a trust by construction in cases of fraud can do equal and complete justice between the parties. * * * When it is said that the person who fraudulently receives or possesses himself of trust property, or who has defrauded another of his estate by misrepresentation, concealment, or other fraudulent practices, is converted by the court into a trustee and ordered to account for or re-convey the property, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties defrauded or benefi-

ally entitled have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of the trust."

The reason that cases of fraud and cases of breach of trust are treated alike in bankruptcy is because they create equitable debts, provable in bankruptcy, and the right to prove in such cases against the members of a firm and the individual partners jointly and severally is given because they are jointly and severally liable in equity (*Ex parte Adamson*; *In re Collie*; L. R. 8 Ch. Div., 807; 818 et seq.).

Under the Act of 1867 it was held in a number of cases that a claim might be provable in bankruptcy although it was not enforceable in an action at law. One of the early cases was *In re Blandin*, 1 Lowell, 543 (5 National Bankruptcy Register Reports 39); Federal Case No. 1527. It was held in that case that although under the law in Massachusetts a wife could not maintain a suit on contract against her husband, nevertheless she could enforce rights to her separate property against him by a proper suit in equity, and that therefore she had a provable claim in bankruptcy for money loaned to the husband.

The Court (Lowell, J.), page 41, said:

"I have little doubt that equitable debts are within the scope of the bankrupt act. It seems to me to be the intent of that statute to give all creditors an equal share of the assets without regard to the mode in which their rights might have been enforced if there had been no bankruptcy; and that the debtor should be

discharged from all debts and demands which are liquidated or capable of liquidation. In respect to both debtors and creditors the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons. It has always been the law of England that equitable demands may be proved in bankruptcy. *Ex parte Williamson*, 2 Ves. (Sen.) 252; *ex parte Taylor*, 1 Rose, 175. 'A commission in bankruptcy,' said Lord Eldon, 'is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could not be satisfied by legal action or equitable suit have compelled payment.' (*Ex parte Dewdney*, 15 Ves. 498)."

In re Bigelow, 3 Benedict, 146; 2 N. B. R., 556; Federal Case No. 1398 and *In re Jones*, 6 Bissell, 68, 78; 9 N. B. R., 556; Federal Case No. 744 were to the same effect as *In re Blandin* (supra). These three cases (*In re Bigelow*, *In re Jones* and *In re Blandin*), were subsequently cited with approval and followed by this Court in *Fleitas v. Richardson*, No. 2, 147 U. S., page 550, at page 553.

In the case of *In re Jordan*, 2 Fed., 319, the case of *In re Blandin*, supra, was cited with approval by the court which held that a claim for money of an estate which had been loaned to a firm of which the administrator was a partner created joint and several liability on the part of the administrator, who had a separate estate, and the firm. The Court said:

"The construction given by Judge Lowe in *In re Blandin*, 5 B. R., 41, to the provision

of the Bankrupt Act respecting proofs of debts relieves these matters of some objections of a technical nature which otherwise might perhaps occasion doubt. * * * Judge Lowell there held that equitable claims were within the scope of the Bankrupt Act, * * * James, L. J., in *Ex parte Adamson*, L. R., 8 Ch. Div., 820, states the law as follows: 'It being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law or in equity, was a provable debt in bankruptcy.'

In the *Jordan* case the Court enforced the "special hybrid rule" so obnoxious to the respondents (see page 117 of their brief) and held that equitable debts could be proved in bankruptcy; that the individual members of the firm and the partnership estate were jointly and severally liable for breaches of trust; and that the English doctrine of election having been repudiated in this country did not operate to defeat double proof.

In *Clarke vs. Rogers*, 228 U. S., 534, which arose under the present Bankruptcy Act, this Court passed upon the question as to whether or not a claim which was not enforceable at law, but only in equity, could be proved, and held that inasmuch as the claim there considered was a claim enforceable in equity, it was provable under the Bankruptcy Act of 1898.

There is, therefore a uniform current of authority in the United States as in England that a claim which could not be enforced in an action at law, but only in equity, may be proved in bankruptcy. The

case of *Ex parte Adamson*; *In re Collie*, L. R., 8 Ch. D., page 807, therefore enforces a doctrine which is common both to American and English Bankruptcy Law.

There is also a uniform current of authority in England to the effect that for frauds and breaches of trust the members of a firm are severally, and the firm assets are jointly, liable in bankruptcy and insolvency proceedings (*Ex parte Turner*, Montagu & McArthur, 255; *Ex parte Poulson*, De Gex, 79 [a leading case]; *Ex parte Burton*, 3 Montagu, Deacon & De Gex, 364; *Smith vs. Jameson*, 5 Term Reports, 601; *Blair vs. Bromley*, 11 Jurist, 617; *Sadler vs. Lee*, 6 Beavan, 324 [a leading case]).

To the same general effect are decisions in the United States (*Matter of Peck*, 206 N. Y., 55; *Re Pierson*, 19 A. D., 478, 483; *Re Blackford*, 35 A. D. [N. Y.], 330; *Morgan vs. Skidmore*, 3 Abbott's New Cases, 92 [Court of Appeals, New York]), all cases arising out of the insolvency of the firm or individual partner against whom proof was sought to be made where it was held that the firm estate and the individual partners were jointly and severally liable. All of these American cases repudiate the English doctrine of election. The cases last cited are supported by the cases of *In re Jordan*, *supra*, and *In re Baxter*, 18 N. B. R., 62 (Federal Case No. 1119), where the English cases are followed holding that for moneys obtained by fraud or breach of trust the persons obtaining the moneys are severally liable, being considered as trustees of a constructive trust, and the firm assets are jointly liable. Both these cases repudiate the English doctrine of election.

In re Coc, 169 Fed., 1002 (affirmed 183 Fed., 745) follows *In re Blackford* and the cases in the Federal Courts last cited and holds the separate estate of a partner who was innocent of any wrongdoing severally liable for a conversion by his partners in the course of the partnership business. These cases establish that the rule here is the same as that laid down by the English cases, viz., that the firm and the individual partners are jointly and severally liable in equity and bankruptcy for frauds and breaches of trust.

If the action in assumpsit for money had and received is equitable in its nature (*Cary vs. Curtis*, 3 How., 236, 246; *Sanford vs. First Nat. Bank*, 238 Fed., 298, 301; *Palmer vs. Doull Miller Co.*, 233 Fed., 309), persons obtaining money by fraud are jointly and severally liable in an action in assumpsit as in a suit in equity; and authorities to support the proposition that joint and several liability exists on waiver of tort in such cases is not wanting (*City Nat. Bank vs. Nat. Park Bank*, 32 Hun, 105, 111; *In re Coc*, 169 Fed., 1002; aff. 183 Fed., 745).

Many of these cases are cited in our main brief, but in view of the apparent effort of counsel for the respondent to show that the Adamson case to which they have devoted so much attention in their brief, enunciates some peculiar doctrine at variance with all other accepted doctrines and states principles which are novelties in the law, we have given this short review of the authorities establishing the soundness of the decision.

In spite of the contention of respondents to the contrary, the Adamson case is a recognized authority in English law and has been repeatedly cited by the courts and text book writers with approval and has never been disapproved or criticized

as a controlling authority in England. It was cited with approval in *In re Parkers; ex parte Sheppard*, 19 Q. B. D., 84, and *In re P. Macfayden; ex parte Vizianagaram Mining Company, Ltd.* (in the Court of Appeals), (1908), 2 K. B., 817, per Farwell, L. J. It is also cited by Lindley on Partnership (Fifth Ed.) page *200 as supporting the proposition that a partnership debt contracted by fraud creates a joint and several liability, and as we have pointed out above was cited with approval and followed to the extent of holding that partners and the firm are jointly and severally liable for frauds and breaches of trust in *Re Jordan*, 2 Fed., 319.

Our adversaries seem to have overlooked the fact that *In re Adamson; ex parte Collie*, supra, was also cited with approval *In re Giles, ex parte Stone*, 61 Law Times Rep., 83, a case upon which they seem to rely as disproving the doctrine laid down in *Ex parte Adamson; in re Collie* but apparently they fail to perceive the distinction between the two cases.

The decision in the Adamson case proceeded upon the theory that the individual partners had obtained moneys by fraud which had become a part of the partnership assets. There is nothing in the facts stated or in the opinion of the court to indicate that either partner benefited by the frauds in any way except as a member of the firm, but it was nevertheless held that a separate liability thereby arose against each member of the firm who had participated in the frauds and also against the joint assets of the partnership.

In the Giles case, on the other hand, Giles had made false representations whereby moneys were paid not to him but to a corporation, and Giles did

not receive any benefit, directly or indirectly, from the fraud and did not become a constructive trustee of any money. It was held that under such circumstances the only liability incurred by Giles was one in tort for fraud, so that the case is clearly distinguishable from the Adamson case.

This very distinction is pointed out in the case of *In re Schuchardt*, 15 National Bankruptcy Register Reports, 161, which is also much relied upon by the respondents. But whatever comfort the respondents derived from that case is based upon a misunderstanding of the facts there considered. The case is not on all fours with the case at bar, but on the contrary the principles involved are the same as those in the Giles case.

One Schuchardt, a member of the firm of Schuchardt & Sons, made certain false statements to a member of the firm of William Agnew & Sons as to the nature of the business carried on by the Schuchardt firm. Following this conversation, Mr. Agnew sent to O. M. Bogart & Co., note brokers to know if the last mentioned firm had any of the Schuchardt paper to sell. Bogart & Company replied that they would go to get some; and they thereupon went to Schuchardt & Sons, purchased for themselves directly from Schuchardt & Sons a note for \$2500 and sold it on the same day they bought it to Mr. Agnew.

A proof of claim was filed against the separate estate of Schuchardt in behalf of Agnew & Sons and this claim was disallowed. The court said:

"No contract can be implied between Agnew & Sons and Mr. Schuchardt, as might be the case if Mr. Schuchardt had received from

Agnew & Sons money which *ex aequo et bono* ought to be refunded. The parties held no such relations as to raise the implication in law, of a contract. Agnew & Sons paid no money to Mr. Schuchardt or to Schuchardt & Sons or to any agent of either. Therefore, no action for money had and received could lie against Mr. Schuchardt. The action would be for deceit, for a tort, and would sound in damages, and they would not be damages arising out of a contract or promise."

This case expressly recognizes the principle appellants deem established by the authorities that if as a result of false representations made by Schuchardt, Agnew & Sons had bought from the firm of Schuchardt & Sons the promissory note in question and payment therefore had been made to Schuchardt & Sons or Schuchardt or an agent of either, a separate liability on the part of Schuchardt would have arisen and that the claim would in that case have been provable. This is the doctrine of the Adamson case.

But inasmuch as the representations made by Schuchardt (even if false) had in fact only led Agnew to purchase the drafts from O. M. Bogart & Co. so that neither Schuchardt nor his firm received any of the money from Agnew & Sons, the case was brought within the principle of *In re Giles*.

Even in the case of *Reynolds vs. New York Trust Company*, 188 Fed., 611, so much relied on by respondents, there is a distinct recognition that if the individual partner against whose estate separate proof was sought to be made had been a participator in the conversion the separate proof

against his individual estate could have been sustained.

Counsel for the respondents, at page 19 of their brief, cite the case of *Strang vs. Bradner*, 114 U. S., 555, as authority for the proposition that a claim based on false representations is not provable as a quasi contractual liability in bankruptcy. It was held under the Act of 1867 (*Strang vs. Bradner*, *supra*), that if a creditor elected to sue in tort he could not prove his claim in bankruptcy, but this court has held the rule to be different under the Act of 1898 (*Crawford vs. Burke*, 195 U. S., 176, at page 193), and in this aspect *Strang vs. Bradner* must be deemed to be overruled.

II.

The respondents have wholly failed to meet the argument made by the petitioners that the structure and words of Section 63 a and b and a consideration of related provisions of the bankruptcy act, as well as an enlightened policy, require that tort claims as well as contract claims should be admitted to proof in bankruptcy.

Respondents' argument against the provability of tort claims is based upon the proposition that inasmuch as tort claims were not provable under the English Bankruptcy Acts nor under the Act of 1867 there is or should be a strong legislative and judicial policy excluding tort claims from proof.

This argument fails to take into account the principle of statutory construction that a pronounced change in the phraseology of the statute indicates a change in legislative intent. In *Crawford vs. Burke*, this court in construing the provisions of Section 17 of the Bankruptcy Act of 1898 said:

"It was the opinion of the Supreme Court of Illinois that 'a mere change in phraseology apparently for the sake of brevity, rendering the meaning somewhat obscure, cannot be regarded as showing a legislative intent to depart so radically from precedents established by previous bankruptcy legislation and judicial decisions, as to provide that debts created by fraud or embezzlement of the bankrupt should be re-

leased by his discharge in bankruptcy, unless such fraud or embezzlement should be committed while the bankrupt was acting as a public officer or in a fiduciary capacity.'

"Our own view, however, is that a change in phraseology creates a presumption of a change of intent, and that Congress would not have used such different language in Section 17 from that used in Section 33 of the Act of 1867 without thereby intending a change in meaning."

The same principles obviously apply to Section 63 a and b of the present bankruptcy statute and the corresponding Section (19) of the Bankruptcy Act of 1867 for that Act after a specific enumeration of claims which might be proved contained the further provision that

"no debts other than those above specified shall be proved or allowed against the estate."

The present bankruptcy statute differs so radically from the earlier statute, and so many years had intervened since the repeal of the older statute and the enactment of the present statute that in our opinion the presumption is strong that it was intended to depart from the rule of the older statute rather than to follow it.

The respondents wholly fail to meet the argument made in our brief that the legislative and judicial trend and policy at the present time require that tort claims should be provable in bankruptcy. In fact they seem to consider that this court is not concerned with questions of policy nor with the legislative trend as shown by the amendment of Section

17 in 1903, and argue in effect that any tendency to reach a conclusion based on a consideration of the structure and words of the present statute and a policy dictated by present needs should be sternly repressed in favor of perpetuating the old statutory rule.

This court has stated in *Crawford vs. Burke*, 195 U. S., at page 187, that Section 63 a and b is susceptible of two constructions, under one of which tort claims in general would be admitted to proof; and in our main brief we have shown that a construction of Section 63 admitting tort claims to proof is consonant with the structure, wording and related provisions of the Act and with an enlightened public policy. This contention our adversaries have failed to meet, because:

1. They cannot harmonize Section 63 a and b, Section 17 and Section 60. They try to whittle away the effect of Section 17 and argue in Point V of their brief that Section 63 is not enlarged or affected by the preceding Section 17, either as that section was originally enacted nor as it was amended in 1903. But this argument proves too much since this court has held in *Crawford vs. Burke*, *supra*, that Section 63 and Section 17 must be read together, and that by considering Section 63 in connection with Section 17, Section 63 embraces a larger class of claims than the corresponding provision of the Act of 1867. The close relationship of Section 63 a and b and Section 17 is also emphasized in *Friend vs. Talcott*, 228 U. S., 27, at page 35, and *Clarke vs. Rogers*, 228 U. S., 534, at pages 547-548. Neither do the respondents attempt to explain the important departure in Section 60 of the present bankruptcy statute from the corresponding

provision in Section 35 of the Bankruptcy Act of 1867.

2. They state no adequate reason why as a matter of policy tort claims should not be admitted to proof, although they must recognize that in a statute in any way ambiguous the Court will resolve the ambiguity in such manner as to avoid the glaring anomalies and injustices in operation of the present statute, if tort claims are denied proof, which we have pointed out in pages 49 to 59 of our main brief.

The respondents on pages 30 and 101 of their brief argue that if unliquidated claims are provable, contingent claims must be provable. This argument loses its force when it is considered that unliquidated claims must first be liquidated before they may be proved. If they are not capable of liquidation, they cannot be liquidated and cannot be proved. Such contingent claims as are capable of liquidation within one year from adjudication are provable (*Moch vs. Market St. Nat. Bank*, 107 Fed., 897; *In re Philip Semmer Glass Company*, 135 Fed., 77; *In re James Dunlap Carpet Co.*, 163 Fed., 541, and many other cases to the same effect). The authorities on page 30 of respondent's brief cited in support of the proposition that contingent claims are not provable are severely shaken if not entirely overruled by the decision of this court in *Central Trust Co. vs. Chicago Auditorium*, 240 U. S., 581.

At pages 34 and 35 of their brief counsel for the respondents state that if Section 63 had been enacted to read

"Debts which may be proved. Debts of the bankrupt may be proved and allowed against his estate, which are:

a. (1) * * * ; (2) * * * ; (3) * * * ; (4) * * * ; and (5) * * * .”

“b. Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate,”

the “arrangement would have indicated an intention in Congress that the cases listed under paragraph b should be considered as co-ordinate with and in addition to the cases listed in paragraph a.” This is an important concession. If the statute had been made to read as thus indicated it would have included unliquidated claims in an enumeration of “debts of the bankrupt which may be proved and allowed against his estate.” This would have involved a contradiction by indicating under the same classification of “debts which may be proved and allowed,” in (a) a class of debts which could be proved and allowed summarily, and in (b) a class of cases where the claims could not be proved and allowed unless further proceedings were taken. Under the arrangement of the statute as it stands the debts which may be proved and allowed summarily are stated in subdivision (a) and those in which further proceedings must be taken are stated in subdivision (b), both a and b being subdivisions of “Debts which may be proved”; the arrangement answering the double purpose of indicating what claims may be proved and the manner of proof in each subdivision. And each subdivision is as much of an enumeration of “debts which may be proved” as is the other. If the statute changed as above stated by respondents’ counsel would have indi-

cated an intention in Congress that the cases listed under paragraph (b) should be considered as co-ordinate with and in addition to the cases listed in paragraph (a), placing the letter "a" before the sentence "debts of the bankrupt may be proved and allowed * * *" does not in any way indicate an intention not to make the cases listed under paragraph (b) co-ordinate with and in addition to the cases listed in paragraph (a), but only makes for clarity and uniformity in the structure of the two subdivisions of the section.

The respondents also place some reliance at pages 33, 83 and 100 of their brief upon *Central Trust Co. vs. Chicago Auditorium*, 240 U. S., 581, as establishing that Section 63-b does not extend the enumeration of debts in 63-a and particularly because the court states that the claim coming within 63-a may be proved under 63-b. We have examined with care the briefs of both counsel in the case last cited and find that it was assumed without discussion that the only question was whether the claim, being a debt under 63-a, could be liquidated under 63-b. The cases cited on pages 82 and 83 of the respondent's brief, *Cohens vs. Virginia*, 6 Wheaton, 264; *Bailey vs. Baker Ice Machine Co.*, 239 U. S., 268, to the effect that general language of the courts should be regarded as restrained by the circumstances in which it was used, applies with particular force to the opinion in *Central Trust Co. vs. Chicago Auditorium Ass'n.*, *supra*, which was not submitted to the court by either party upon any theory that Section 63-b enlarges the enumeration of debts which might be proved enumerated in 63-a.

The respondents at pages 55-102 of their brief derive much comfort from the alimony cases (*Audu-*

bon vs. Schufeldt, 181 U. S., 575; and *Wetmore vs. Marcoe*, 196 U. S., 68). But a consideration of these cases leads, we think, to the conclusion that this court will not perpetuate an injustice upon tort creditors by denying them the right to prove their claims in bankruptcy, for these cases show an intention to emphasize considerations of sound public policy in interpreting the provisions of the act.

In *Audubon vs. Schufeldt*, *supra*, the judgment which it was contended was discharged by bankruptcy was subject to modification even when in arrears upon good cause shown to the court having jurisdiction, and it was, therefore, held that it did not create a debt and was neither provable nor dischargeable.

In the case of *Wetmore vs. Marcoe*, *supra*, the question was presented whether a judgment of the Supreme Court of New York awarding alimony which was fixed and absolute was discharged by the bankruptcy of the husband, the husband having obtained his discharge in bankruptcy before the amendment of 1903. The court held that the claim was not discharged and based its decision in part upon what it regarded as the policy of the bankruptcy statute. The court said:

"The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce. Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial

life, freed from the obligation and responsibilities which may have resulted from business misfortunes. Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children. While it is true in this case the obligation has become fixed by an unalterable decree, so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them as against the husband and father."

We cannot believe that this court will depart from the policy announced by it in the case of *Wetmore vs. Marcoe* (supra), that it will give the bankruptcy act "such interpretation as will effectuate its beneficent purposes" and will at the same time give a construction not required by direct enactment whereby tort creditors of a bankrupt corporation are not admitted to proof, and whereby persons incurring liability for tort claims without individual fault are not discharged from such claims, and whereby all the anomalies and inconsistencies pointed out at pages 50 to 59 of our main brief will be perpetuated.

The respondents at pages 99-100 of their brief attempt to meet the argument that if tort claims are

not provable a transfer or payment to a tort creditor in satisfaction of his claim within the four months' period would stand against a trustee in bankruptcy by contending that any such transfer would be set aside as being a transfer in fraud of creditors, and cite *Dean vs. Davis*, 242 U. S., 438, in support of this contention.

It has always been the law that even where a preference may lawfully be given, a preferential transfer made, not merely for the purpose of preferring the creditor but primarily to put the property out of reach of other creditors, may be set aside by a court of equity, and the Bankruptcy Act gave statutory recognition to this rule. The case of *Dean vs. Davis*, supra, which did not involve a transfer to a creditor but to a third person, held that the transfer there considered was a fraud upon creditors because the person to whom it was made knew that the effect of the transfer would be to provide funds for the payment of one creditor and to withdraw all the debtor's property from the reach of other creditors and involved a fraudulent scheme to put the property of the bankrupt out of the reach of his creditors.

This would not be the effect of a transfer made in good faith by a debtor to a tort creditor in *bona fide* satisfaction of the tort creditor's claim, because, as was held by this Court in *Van Iderstine vs. The National Discount Co.*, 227 U. S., 575, at page 581, a transfer which operates as a preference is merely *malum prohibitum* and then only to the extent that it is forbidden, while a transfer in fraud of creditors is *malum per se*. If tort claims are not provable, a transfer to a tort creditor would be neither *malum prohibitum* or *malum per se* and would stand against other creditors. A

transfer of property with the intention of preferring the creditor, even though known to be a preference both to the creditor and to the debtor, if made in good faith and for no other purpose than to satisfy a just claim, is good at law, independently of bankruptcy statutes, and is only voidable when the transfer comes within the direct prohibition of the statute.

Carrying the respondent's argument to its logical conclusion there was no need to declare preferences to a creditor within the four months' period void and to give a remedy for their recovery, for on respondents' theory all such preferences would be in fraud of creditors and recoverable without statutory enactment.

On pages 120-121 of their brief, respondents quote from *U. S. vs. Ames*, 99 U. S., 35, to the effect that if a creditor has a joint and several claim on contract and sues the joint contractors jointly and obtains a judgment, he cannot afterwards sue the parties separately and have two judgments against the same person for the same debt. A proof of claim in bankruptcy, however, against joint and several debtors under the Bankruptcy Law of 1898 does not have the same operation as a judgment. *Friend vs. Talcott*, 228 U. S., page 27; *In re McCoy*, 150 Fed., 106 (appeal dismissed), *Chapman vs. Bowen*, 207 U. S., 89.

III.

The English Doctrine of election being fundamentally unsound and having been repudiated by the American Courts, has no application to the case at bar.

Respondents apparently appreciating that the English doctrine of election has been absolutely repudiated by the American courts, contend at page 117 of their brief that the same result has been reached in England by Rule 18 of the Second Schedule (Bankruptcy Act of 1869), and from this, seem to predicate an argument that the rule of election applied in *ex parte Adamson*; in *re Collie*, *supra*, and in *re J. & H. Davison*; *ex parte Chandler*, 13 Q. B. D., 50, is some kind of a peculiar rule which is not based upon the old English doctrine of election.

As shown by the careful opinion and review of authorities of Judge Sprague in *In re Farnum*, Federal case No. 4674, the English rule proceeded upon the theory that where persons were jointly and severally liable, they could not be sued severally and sued again jointly; the creditor had his election of suing them separately or jointly; and the same limitations were imposed upon proofs in bankruptcy. 8 Fed. Cases, pages 1057, 1058, 1059. This doctrine was not peculiar to cases arising out of joint and several contracts but was applied in all cases where the liability was joint and several.

Lindley on Partnership (5th ed.), pages •744-•745, states the English rule, and on pages •745-•746 states the application of the rule and shows

that it applies equally to joint and several contract claims as well as to joint and several obligations arising out of frauds and breaches of trust.

Under the act of 1883, Rule 18, Sched. 2, the rule was modified by statute in England, the statute reading as follows:

"If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstances that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts."

The effect of this statute as applied to quasi contracts and equitable debts is now defined by the English courts in *In re Parkers*; *ex parte Shepard*, 19 Q. B. D., 84, and in *In re P. Macfayden*, *ex parte Vizianagarum Mining Co., Ltd.* (in the Court of Appeal) (1908), 2 K. B., page 817. In the first case cited, one of the trustees of a trust fund was also a member of a firm of solicitors. Certain moneys were given to the firm for investment but instead of being invested were misappropriated. It was held that proof could be made against the joint assets of the partnership as well

as against the individual assets of the trustee, the Court holding that the obligation of the trustee not to dissipate the fund was the distinct contract of a sole trader within the meaning of the English statute. In the other case, one of the members of a firm of merchants and bankers was also a director of a mining company. The firm misappropriated the proceeds of certain bills of lading entrusted to their care and it was held that the implied contract of the director not to dissipate the assets of the corporation constituted a contract distinct from the obligation of the firm to restore the moneys which it had wrongfully misappropriated and that the director was a sole trader by reason of the breach of his duty as a director and that the double proof could be made under the statute.

These cases, however, expressly recognize that the doctrine of election, except in so far as it is changed by Rule 18, Sched. 2, still exists in England, Farwell, L. J., saying in his concurring opinion in *In re Macfayden* (*supra*):

“No double proof is allowed for debts in respect of which the debtor is jointly and severally liable unless Rule 18 of Schedule 2 of the Bankruptcy Act of 1883 applies.”

It therefore follows that under the operation of the present English statute, the firm and the individual partner may be jointly and severally liable and at the same time the doctrine of election may be applied.

If in a partnership of A and B, the partners are guilty of misappropriating a trust fund of which

C is trustee, under the present English law, separate proof may be made against A and B and proof may also be made against the assets of the firm. But if proof is made against the firm, it cannot be made against the two individual partners or any one of them; but if in a partnership of A, B and C, C is trustee of a trust fund and he and his partners are all guilty of misappropriation, separate proof can be made against the individual estate of C and also against the assets of the firm but not against the individual estates of A and B, if proof is made against the firm.

But the repudiation of the doctrine of election by the American courts has no such refinements but strikes at the heart of the whole doctrine, for the theory of the American courts is that where there are joint and several rights, there are joint and several remedies in bankruptcy (in *re Jordan*, 2 Fed., 319; in *re Blackford*, 35 App. Div., 330; in *re McCoy*, 150 Fed., 106 [appeal dismissed *sub nom.* *Chapman vs. Bowen*, 207 U. S., 89]).

Parsons on Partnership, Fourth Ed., pages 486, 487, points out the unsoundness of the English doctrine of election and states (487) "It has not been established in this country."

At page 114 of their brief, respondents point out that the cases there cited arose when Section 21 of the American Bankruptcy Act of 1867 was in effect. All of these cases, however, followed the earlier decision of *In re Farnum*, Fed. Case No. 4674 decided under the Statute of 1841, which had no corresponding provision and only two of them, the case of *In re Jordan*, 2 Fed. Rep., 319 and the case of *Emory vs. Canal National Bank*, 3

Cliff., 507 (Fed. case No. 4446) contain any reference at all to the statute. In the case last cited the decision of Judge Sprague in *In re Farnum*, was cited with approval as "an opinion of great research and ability."

On page 115 of his brief counsel for the respondents argue that in order to be permitted to make double proof against a firm and its individual members there must be "an independent obligation or undertaking of the individual partner" and the court below in stating that separate proof might be made if the individual partners "had been guilty of a separate and personal delinquency from that of the partnership" apparently followed this argument.

We have shown above that the joint and several liability of a firm and its members implicated in a fraud arises by reason of the fact that courts of equity and bankruptcy raise a constructive trust in cases of fraud and hold the firm and the individual members jointly and severally liable for the proceeds of the frauds.

We have also shown in Point VI of our main brief (pages 78-88) that neither the rule of marshaling assets in equity nor the statutory expression of that rule in Section 5f of the Bankruptcy Act operates to prevent proof to be made against the firm estate and the individual estate of the partner when the members of the firm are jointly and severally liable for frauds and breaches of trust any more than it operates to prevent proof upon joint and several contracts, and indeed the English doctrine of election would have had no importance if joint and several liabilities arising out of contract, fraud and breach of trust

in connection with partnership transactions were only provable against the firm estate, and the creditor had no election.

Nor was the fact of "an independent obligation or undertaking of the individual partner" of any moment before the English Statutes (Act of 1883, Schedule II, Rule 18 and the preceding statutes of similar import); for in spite of "an independent obligation or undertaking of the individual partner" the creditor was still put to his election of proving against the individual partner or the firm.

It is only under statutes such as the present English Statute permitting double proof when the bankrupt is liable, in respect of distinct contracts, as a sole trader and as a member of a firm, that "an independent obligation or undertaking of the individual partner" has any importance whatever; but in England under the statute it now determines the right to double proof.

The English statute of course has no effect here and inasmuch as the courts in this country and this court in *Chapman vs. Bowen*, 207 U. S., 89, have repudiated the doctrine of election "an independent obligation or undertaking of the individual partner" does not affect the right to make double proof.

The petitioners have made no election by accepting a dividend on the claim filed against the partnership, as is apparently claimed on page 116 of respondent's brief. They filed all their proofs of claim on the same day and as a matter of fact filed the proofs of claim against the individual partners first. Whatever electing was done, was done by the trustees when they issued dividend checks on the claim against the firm and moved to expunge claims filed against the individual partners. If the

petitioners are compelled to make an election to prove against the individual estates or against the firm estate, they can restore the amount of the dividend received with interest and will then be in the same position as before. It was so held in the case of *Ex parte Adamson*; *In re Collie* (supra), and in *Ex parte Chandler*, 13 Q. B. D., 50. But as we have shown in our main brief and also in this brief, the doctrine of election is unsound in principle and has been repudiated in many important decisions in the American courts where the question was presented.

The respondents have wholly misconceived the effect of the case of *Reynolds vs. New York Trust Company*, 188 Fed., 611. As we have shown in our main brief (pages 71 to 73) the Court was at pains to point out that Mr. Gay, the partner against whose individual estate proof was sought to be made, was innocent of any individual wrongdoing. It was only because there was no evidence in the record to show participation in the fraudulent diversion of the moneys on the part of Mr. Gay that the Court decided that there was no obligation in quasi contract on his part which was provable against his individual estate. The Court then held that a separate obligation on the part of Mr. Gay would not be implied merely by reason of his membership in the firm and whatever is said of election has relation only to a separate implied contract arising solely from Mr. Gay's membership in the firm in the absence of some specific participation in the fraud which the Court indicates would give a right to prove against his separate estate.

In this connection the court in the *Reynolds* case seems to have overlooked the fact that the English

cases enforcing the doctrine of election proceeded upon the theory that at law in the case of joint and several contracts, the creditor's right is to have his cause of action joint or several, but not both (Lindley on Partnership, 5th Ed., pages *744-*745). And while seeking to distinguish its own doctrine of election from that of the English cases (which it must have been aware has been repudiated in this country), states as a foundation of its doctrine the very reasoning of the old English cases establishing the rule of election. In thus stating the English rule and its own departure from that rule while basing its own rule on the foundation of the English rule, the Court very evidently labored under a misapprehension.

IV.

The petitioners are entitled to make separate proof against the estates of Albert Le More and Ed. E. Carriere as well as against the joint estate on general principles of equity and justice.

The respondents, at page 124 of their brief, state that "their sense of injustice of permitting double or triple proof in this case has been so keen * * * that they felt it their particular duty to contest the attempt at such proof."

This view has not, however, been the view of American courts of equity in considering a precisely similar situation. In *Morgan vs. Skidmore*, 3 Abbott's New Cases, 92 (Court of Appeals, New York), which was a suit in equity to charge the estate of a deceased partner who had made false representations whereby the plaintiffs, the firm of J. S. Morgan & Company, had been induced to issue bills of exchange for £12,000 by the statement of such deceased partner that his firm of E. R. Goodridge & Company was in good condition and was perfectly solvent, when as a matter of fact, it was insolvent. Suit had been brought against the surviving partner in contract for the amount which J. S. Morgan & Company had been obligated to pay when the drafts became due and judgment obtained which bound the surviving partner and the assets of the firm, and the judgment not having been fully satisfied a second suit was then brought against the estate of the deceased partner. It was contended there as here that it was inequitable to

allow a recovery in the second suit because it would give the plaintiffs additional rights over other firm creditors in a partnership matter, but this contention was not sustained by the Court. The Court said (Rapallo, J.) :

"A member of a copartnership consisting of several persons may create a valid, several and individual liability on his own part for a debt due by the firm; and the joint liability of the firm and the several liability of the individual partner may both be enforced. A creditor holding the obligation of the firm, and having the additional security of the several and individual liability of one of the copartners, is entitled at law and in equity to all the benefits which attach to each. He is not bound to elect between them, and neither merges in the other. One member of a firm may guarantee a debt due by the firm; he may indorse its paper, or may give his individual undertaking as collateral to that of the firm. Such an individual security may be of great value to the creditor. One member of a firm may be abundantly responsible for all his individual obligations, and yet the firm may be involved to an extent far beyond the means of the partner individually solvent. In case of his death, the creditor holding his individual guarantee will be secure, while without it, he would be obliged to come in *pro rata* with all the creditors of the firm.

* * * * *

These being the rules applicable to cases where all the obligations rest in contract, is

there any distinction in principle when the obligation of the individual partner arises out of his fraudulent representation as to the solvency of the firm, whereby the creditor has been induced to trust it?

The liability of the partner making the representations in such a case, is in extent similar to that of one who guarantees the solvency of the firm. He is bound to make good his representations, by paying the damages resulting from the insolvency of the firm. The only difference is that in one case, he, by express contract, assumes this liability, and in the other, the law casts it upon him. Indeed, this position is conceded by the appellant in his points, where it is claimed that the party making the misrepresentations is in effect treated as a guarantor of the debt.

Such being the responsibilities of a partner making representations as to the solvency of his firm, a party asked to give it credit may well rely, in doing so, upon such representations.

Although the party giving the information is interested in giving the credit, yet he is in a position to know the facts, and is individually of abundant pecuniary ability to respond for any deceit.

This individual responsibility is the inducement to the creditor to part with his property, and no injustice is done to the partner making the representations, or to his estate, by making him or it responsible in the same manner as though he had guaranteed the debt, if the representations were intentionally false.

• • • • •

The second ground of objection to this recovery remains to be considered, viz.: that it gives the plaintiffs a double preference. This is not an unusual result, nor is such a preference in conflict with any principle of equity. When a partner by his own act makes himself individually liable for a debt of his firm, whether by express contract or otherwise, the creditor is entitled to the full benefit of that obligation, in addition to the obligation of the firm.

A creditor holding the joint obligation of a firm and also the separate obligation of one of the copartners as surety for the same debt, is entitled to payment out of the partnership assets in preference to the individual creditors of the partners; and if he fails to obtain payment out of those assets he is entitled to preference over the other partnership creditors in the distribution of the separate estate of the individual partner. (*Wilder vs. Keeler*, 3 Paige, 167, 176.)

Such are the rules of marshaling assets in equity where the separate obligation of the individual partner rests in contract, and therefore it is not a just ground of objection to compensation for a wrong, that it would result in a similar distribution. If it is equitable where the deceased partner has agreed to assume the individual obligation, it is equally equitable where the law compels him to assume it, as a just compensation due to the party whom he has misled."

We cannot do better than adopt this reasoning and language of the Court of Appeals of the State

of New York as showing the inherent justice in allowing double proof to be made against the separate estates of Albert LeMore and Ed. E. Carriere, who instigated the frauds perpetrated upon Muller, Schall & Co., as well as against the firm estate.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1919.

No. 84

WILLIAM SCHALL, JR., ET ALS.,
Petitioners,

VERSUS

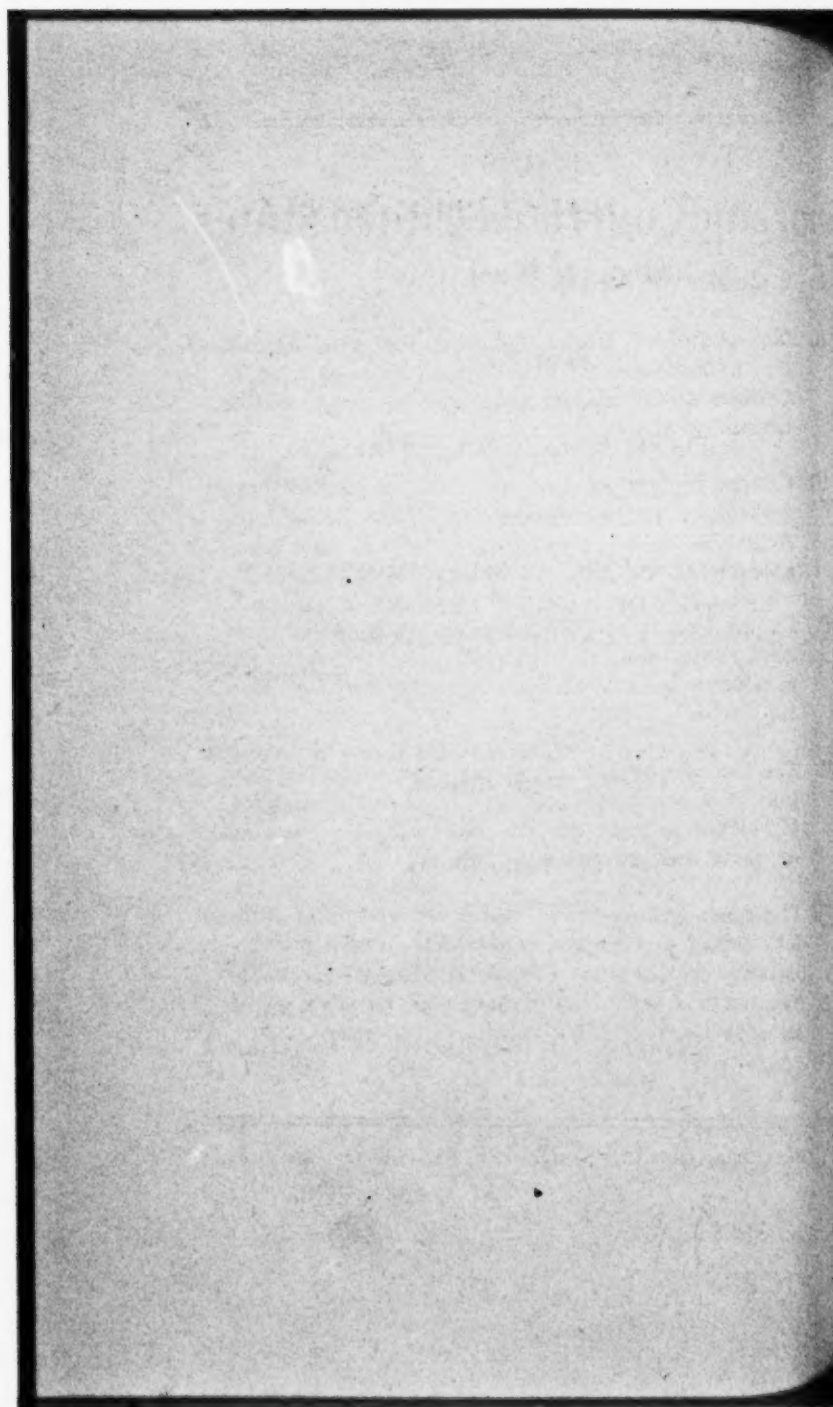
**FREDERIC CAMORS, ET ALS., TRUSTEES OF
ESTATES OF ALBERT LEMORE AND
EDWARD E. CARRIERE, BANKRUPTS.**
Respondents.

**Certiorari to the United States Circuit Court of Appeals
for the Fifth Circuit.**

Brief for Respondents.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

No. 84

WILLIAM SCHALL, JR., ET ALS.,

Petitioners,

versus

**FREDERIC CAMORS, ET ALS., TRUSTEES OF
ESTATES OF ALBERT LEMORE AND
EDWARD E. CARRIERE, BANKRUPTS.**

Respondents.

**Certiorari to the United States Circuit Court of Appeals
for the Fifth Circuit.**

Brief for Respondents.

I.

STATEMENT OF THE CASE.

If The Court Please:

Prior to the 8th day of May, 1914, Albert LeMore and Ed. E. Carriere carried on business in the cities of New Orleans and Mobile as partners. In the City of New Orleans they operated under the firm name of A. LeMore & Com-

pany, and in the City of Mobile under the name of Ed. E. Carriere & Company. There was thus one partnership operating under two names. The business carried on by the partnership was that of exporting staves to Europe. The firm's operations grew to considerable magnitude requiring large credits and the use of large sums of money. This credit was obtained chiefly by the selling of drafts drawn against houses in Europe. The firm maintained an office in the City of New York, with a resident agent there, T. C. Trippe by name, whose business it was to sell to banks in the City of New York the drafts drawn by the partnership against its foreign correspondents. These drafts were usually accompanied by documents purporting to be bills of lading, representing shipments of staves against which the drafts were supposed to be drawn.

On the 8th day of May, 1914, upon an involuntary petition in bankruptcy, the partnership and the individual members thereof were adjudicated bankrupts. Thereafter, Fred-eric Camors, Nicholas Riviere and R. M. Walmsley were duly elected and duly qualified as trustees of both the partnership and individual estates. The claims proved and allowed against the partnership estate exceeded \$3,000,000.00, the precise figures being \$3,213,947.44. This includes the claim of Muller, Schall & Company, the present appellants, for \$70,050.00, which was duly proved and allowed as a claim against the partnership. The partnership assets were appraised at \$313,887.47, or something under 10% of the partnership debts (Tr., p. 29). The individual assets of Albert LeMore were appraised at \$39,403.80, with individual liabilities, (excluding the claim of Muller, Schall

& Company, who are attempting double proof), aggregated \$37,084.98. The individual estate of Ed. E. Carriere was appraised at \$25,443.88, with individual liabilities (excluding the claim of Muller, Schall & Company for double proof) aggregating \$1,526.79.

On the 8th day of May, 1915, the last day of the year allowed by law, the firm of Muller, Schall & Company, the present petitioners, filed three proofs of claim: (1) one against the partnership known as A. LeMore & Company or Ed. E. Carriere & Company; (2) one against the individual estate of Albert LeMore; and (3) one against the individual estate of Ed. E. Carriere. All of these proofs were based upon the same transactions; that is to say, upon the purchase by Muller, Schall & Company of certain checks and drafts drawn by the partnership and sold to Muller, Schall & Company in New York by the partnership's agent, T. C. Trippe, in the regular course of the partnership's business (Tr., pp. 24 to 28). At the time these transactions took place (in November and December, 1913) Albert LeMore was in Europe, where he had been since the preceding March (Tr., pp. 25-28) and Ed. E. Carriere was in New Orleans. **The drafts sold to Muller, Schall & Co., were handled in the same way as drafts sold to all other buyers of drafts in New York in the regular course of business** (see testimony of Harris, Tr., pp. 27, 28). The proceeds of the drafts enured directly and entirely to the partnership and not to any extent to either of the individual partners. (Tr., pp. 25, 27.)

The proof of Muller, Schall & Co. against the individual estates of LeMore and Carriere was based upon the allega-

tions that fraudulent representations had been made (1) that the firm was solvent, and (2) that the drafts purchased represented the price of actual shipments of staves. The individual names or endorsements of Albert LeMore and Ed. E. Carriere did not appear upon any of the drafts purchased by Muller, Schall & Company, and Muller, Schall & Company had no separate or special contract or dealings with either LeMore or Carriere individually.

Neither LeMore nor Carriere had any special individual connection with the Muller, Schall transactions which were handled entirely through Trippe, the partnership agent, and neither LeMore nor Carriere made individually any special representations to Muller, Schall & Co., apart from the representations through the partnership agents and employees in the regular course of the partnership business.

The proof filed by Muller, Schall & Company, against the partnership, upon the drafts purchased, was duly allowed, and dividends have been paid to Muller, Schall & Company out of the partnership assets *pari passu* with the other partnership creditors. The attempts to make separate and double proof against the individual estates was, however, resisted by the trustees upon two grounds:

(1) That the claims of Muller, Schall & Company against LeMore and Carriere individually, sounded in tort only, and hence were not provable.

(2) That the claims of Muller, Schall & Company arose entirely out of partnership transactions and were properly provable against the partnership estate, and that they could not, within either the letter or the spirit of the

Bankruptcy Act, be made the subject of double and separate proof against the individual estates, to the detriment of individual creditors and so as to give Muller, Schall & Company a preference over other partnership creditors in precisely the same situation as themselves.

After a hearing and full argument, the referee sustained a rule taken by the trustees to expunge the proofs of Muller, Schall & Company against the individual estates, upon both the grounds above assigned, rendering an elaborate written opinion, which will be found in the transcript at pages 30 *et seq.*

A petition to review the referee's judgment was presented to the District Court and there again fully argued. The District Judge affirmed the referee's finding, saying (Tr., p. 54) :

"In this matter, the opinion of the referee is exhaustive and conclusive.

"His judgment is right and will be affirmed."

Muller, Schall & Company then prosecuted an appeal, coupled with a petition to superintend and revise, to the Circuit Court of Appeals for the Fifth Circuit.

That Court affirmed the judgment of the District Court, resting its decision particularly upon the ground that the claim of Muller, Schall & Company was in its essence entirely a partnership liability and not based upon any dealings or transactions with the individuals which would entitle claimants to separate and double proof against the individual estates such as might have been allowed if there had been special dealings with either partner as an individ-

ual. See the opinion of Grubb, J., at pp. 62 to 65 of the record, particularly page 64, where he said:

"The partners were cognizant of the frauds, although the particular drafts were not signed or endorsed or negotiated by either partner, and neither partner profited from the transaction except through his interest in the firm. **The transaction was one in the ordinary course of the firm business**, except that it was a fraudulent one, and the proceeds of the drafts went to the credit of the firm and were used in the conduct of its business. Eliminating its fraudulent character, the transaction was altogether a partnership one, and would have supported proof of claim only against the partnership estate. It is contended that the commission of the fraud was the act of the partners, even though they did not, in person, sign and negotiate the drafts, because the fraud of their agent was indisputable to them, and because they knew of the fraudulent system, under which the firm was doing business. If the act of the partners, then the contention is that it will support a claim against the partners individually, which can be proven in bankruptcy against their individual estates, either as a tort or upon the theory of waiver of its tortious character. We do not think that the policy of the bankrupt law to subordinate firm creditors to the creditors of the partners individually in sharing the individual assets of the partners, would permit us to entertain such a fiction. **We think the determination as to whether the claim is partnership or individual or both, should depend upon the real character of the transaction, and, if that be unmistakably an exclusive partnership one, neither fiction nor**

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implication should be resorted to to give it a different character. If the partners had by separate contract of guaranty obligated themselves to the claimants, such separate contract would have afforded a basis for a claim against their individual estates. So, if it had been shown that their individual estates had been enriched by the transaction complained of, or that they had been guilty of a separate and personal delinquency from that of the partnership, an individual obligation to make restitution to the injured claimant might have been implied. In the absence of a separate, individual obligation, or a showing of benefit moving to the partner individually from the transaction, we can see no reason for sustaining a double proof of claim in favor of the implied obligation, when it would not be sustained where the obligation is an express one."

From the Court of Appeals the case was brought to this court by *certiorari*.

As the foregoing statement indicates, the interest of the trustees, who are respondents here, is merely that of discharging their sworn obligations by protecting the general creditors of both the partnership and individual estates. As also indicated by the statement, the objections presented by the Trustees, to the allowance of the claims of Muller, Schall & Company as separate and double, or doubly triple, proofs against the individual estates, were based upon two grounds:

(1) That the claims of Muller, Schall & Company against LeMore and Carriere individually, sounded in tort only, and hence were not provable.

(2) That the claims of Muller, Schall & Company arose entirely out of partnership transactions and were properly provable against the partnership estate, and that they could not, within either the letter or the spirit of the Bankruptcy Act, be made the subject of double and separate proof against the individual estates, to the detriment of individual creditors and so as to give Muller, Schall & Company a preference over other partnership creditors in precisely the same situation as themselves.

We take up these points for consideration in their order:

II.

THE CLAIMS OF MULLER, SCHALL & COMPANY AGAINST THE INDIVIDUALS, ED. E. CARRIERE AND ALBERT LeMORE, SOUND IN TORT ONLY AND ARE NOT PROVABLE CLAIMS.

It is apparent upon the face of the claims of Muller, Schall & Company that they sound only in tort, resting entirely upon alleged fraudulent representations. There was no express contract with either of the individual partners, none of the drafts purchased by the claimants having been endorsed or signed by either of the individuals. There is no basis for the presentation of the claims as upon an implied or *quasi* contract on the theory of waiving the tort, for the reason that it is essential to such presentation of a claim that there should be an unjust enrichment of the

tort-feasor; or, in other words, that the proceeds of the tort should have come into his hands. In the present case, there is no allegation or pretense in the proofs of claim that either LeMore or Carriere individually, or their individual estates, received any of the moneys loaned by Muller, Schall & Company to the partnership, and that they were in any manner enriched or benefited thereby. Conceding, therefore, that proofs of claim make *prima facie* evidence for claimants, the proofs in this case make no showing on this point at all. If such a showing be essential to petitioners' case, as we think it is, it fails at the outset. But beyond this, the record affirmatively shows, and, indeed, counsel admitted at the trial, that no proceeds of the alleged tort came into the hands of LeMore or Carriere individually; they all inured to the partnership. See testimony of Ed. E. Carriere (Tr., p. 25):

Q. Mr. Carriere, did Mr. LeMore personally get any of the money advanced by Muller, Schall & Company upon the purchase of these drafts and checks?

A. No, sir.

Q. To whom did the money go?

A. The money was remitted by cable to Europe to meet payments of drafts maturing to Gairard and others.

Q. Whose drafts, Mr. Carriere?

A. A. LeMore & Company, and probably Ed. E. Carriere & Company.

Q. Were those transactions by Mr. Trippe in the regular course of the partnership business?

A. Yes, sir.

Q. Did you, Mr. Carriere, get any of the money advanced by Muller, Schall & Company upon the purchase of these drafts and checks?

A. No, sir.

See also testimony of Guy C. Harris (Tr., p. 39):

Q. Do you know what was done with the proceeds of these particular drafts and checks described in the proof?

A. It was customary for him (Mr. Trippe) to make remittances.

Mr. Congleton:

If the Court please, we will concede that this money went to the firm account. We do not contend that either of the partners received any of the proceeds of the discounts of these drafts, personally, except as they were received by the firm of A. LeMore & Company.

Mr. Lemann:

Q. Mr. Harris, at the dates upon which these transactions described in this proof of claim took place, where was Mr. LeMore?

A. He was in Europe.

Q. How long had he been there, do you know?

A. About March of 1913.

Q. Where was Mr. Carriere?

A. He was in the New Orleans office.

Q. Was the firm in the habit of sending drafts and checks to Mr. Trippe, in New York, for sale?

A. How do you mean?

Q. Was it done only in the case of Muller, Schall & Company?

A. Oh, no; it was done with all the other buyers of drafts in New York.

Q. In the regular course of business?

A. Yes, sir.

No basis can therefore possibly be suggested for the raising of an implied or *quasi* contract in this case on the part of LeMore or Carriere individually, since the transactions were entirely partnership transactions and the proceeds thereof inured entirely to the benefit of the partnership.

See *Keener on Quasi Contracts*, p. 160:

"Assuming a defendant to be a tort-feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby."

Bigby v. United States, 188 U. S. 400 (at 409), where the Court said:

"A party may, in some cases, waive a tort, that is, he may forbear to sue in tort and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that 'a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which *assumpsit* can be maintained.' *Cooper v. Cooper*, 147 Massachusetts, 370-373."

Reynolds v. New York Trust Company, 188 Federal 611, a case on all fours with the present one and hereinafter quoted at length, where the Circuit Court of Appeals for the First Circuit held that:

"The rule, which permits the owner of property converted to waive the tort and recover the value of the property as on an implied contract, is based on the ground that defendant's estate has been unjustly

enriched by the conversion, and where it was by a partnership, and inured to the benefit of the firm estate, whatever implied contract arises is that of the firm, and not of an individual partner, and the owner of the property, after having proved his claim against the partnership estate as one of contract, is not entitled to prove it against the individual estate of a partner, which would have the effect of giving them an advantage over creditors having express contracts with the firm."

See also, *Kyle v. Chester*, 37 L. R. A. (N. S.) 230; *Greer v. Newland*, 70 L. R. A. 554; 12 *American and English Enc. of Law*, 2nd. Ed. 695-696.

When the Court examines the authorities cited at pages 18 to 23 of petitioners' brief, it will be found that in every one of those cases where an action of *quasi contract*, or for money had and received, was held maintainable, the defendant had received money or property of the plaintiff and was unjustly enriched.

See *Catts v. Phalen*, 2 How. 376, (where petitioners' own statement of the case shows that the moneys claimed had been paid to defendant); *Burton v. Driggs*, 20 Wallace 125, (where, at page 137, it appears that the defendant admitted the receipt of the money); *In re J. Arnold & Company*, 133 Fed. 789, (where proof was attempted only against the partnership estate and was properly maintained for moneys actually received by the partnership—no attempt being made, as here, to claim separately and doubly against the individual partners); *Stanhope v. Swafford*, 77 Iowa 594, (where defendant had personally actu-

ally received money from plaintiff for the sale of a farm) ; *First State Bank v. McGauhey*, 38 *Texas Civil Appeals* 495, 86 *S. W.* 55, (where the quotation, at page 23 of petitioner's brief, shows on its face that the defendant, A, actually received the money which it was held that he would be required to refund upon an implied promise.)

In each and every one of these cases, the defendant held liable upon *quasi* contract had directly received money or property of the plaintiff, and was held liable upon an implied promise to repay the money or property thus received upon the ground of unjust enrichment.

In the present case, it is admitted that LeMore and Carriere, as individuals, received no money or property, and there is no basis for the implication of a *quasi* contract against their individual estates within any of these authorities.

See also the many authorities referred to *infra*.

It must, therefore, be conceded finally that the claims against Carriere and LeMore, individually, sound only in tort.

Are claims sounding only in tort provable in bankruptcy?

By the overwhelming, indeed, unanimous, current of direct authority, they are not; **nor have torts of the character here involved ever been provable at any time under any of the various Bankruptcy Acts which have from time to time been enacted in this country prior to the present act; nor are they provable under the bankruptcy laws of England, upon which our laws are modeled.**

III.

**CLAIMS IN TORT OF THE SORT HERE PRESENTED
HAVE NEVER BEEN PROVABLE UNDER ANY
OF THE BANKRUPTCY ACTS ENACTED IN THIS
COUNTRY; NOR ARE THEY PROVABLE UNDER
THE BANKRUPTCY LAWS OF ENGLAND.**

We have had four Bankruptcy Acts in this country: the Act of April 4, 1800, repealed within three years of its passage; the Act of August 19, 1841, repealed within two years of its passage; the Act of March 2, 1867, which prevailed for eleven years; and the present Act of July 1, 1898. There were decisions under each of these acts (even though the earlier ones were in force for so short a time) to the effect that tort claims were not provable thereunder.

Thus under the Act of 1800:

*Dusan v. Murgatroyd, Fed. Cases 4199 (Dist.
Ct. of Pa., 1803:*

This was a claim against the owner of a vessel for negligent injury to goods through the boat filling with water. The Court said:

"The true rule seems to be that if the original ground of action is founded on contract, but if the immediate cause of action arises *ex delicto* and is a claim for damages unliquidated by an express agreement, or such as the law will not imply an agreement to pay, it is not such a claim as would be brought before the commissioners."

Citing a number of early English cases in the foot-note.

To the same effect were the decisions under the Act of 1841:

Doggett v. Emerson, Fed. Cases, 3962 (Dist. Ct. of Maine, 1846).

Under the Act of 1867 the decisions denying the provability of tort claims were more numerous, as would be expected from the fact that the law was in force for so many more years than the earlier laws. In

In re Schwartz, Fed. Cases, 12,502 (Dist. Ct. of New York, 1877)

the claim of creditors who had been induced to make a sale by false representations was held to be provable because arising out of contract, the Court saying:

"Had the action of the petitioners taken the form of an action for the specific merchandise sold a different claim would have been presented. Where a claim rests **in contract**, although fraudulently induced, and is prosecuted in an action sounding in damages, it continues to constitute a provable debt even though the fraud must be proven to entitle the complainant to recover."

In the present case, of course, the claim does not rest in contract so far as the individuals are concerned. In

In re Lachmeyer, Fed. Cases, 7966 (Dist. Ct. of New York, 1878)

Judge Choate said:

"It will be observed that section 572 of the Revised Statutes (Sec. 19 of the Act of 1867) necessa-

rily implies that there are claims which may in some sense be described as debts which are not provable. One well-defined class of such obligations is the whole class of unliquidated demands for mere torts."

Judge Choate went on to point out:

"The two chief objects or chief purposes of the bankruptcy law are the relief of unfortunate persons who by losses in business have become insolvent and unable to pay their debts, and the equitable distribution among their creditors of such property as the unfortunates may have. It is chiefly for the relief of business men as business men and indirectly for the public good, rehabilitating them to a condition in which, as active business men, they may take proper share in the productive and industrial class of the community."

In *Black v. McClelland*, *Fed. Cases*, 1462, (*Dist. Ct. of Pa.*, 1875), and *In Re Hennocksburgh*, *Fed. Cases*, 6367 (*Dist. Ct. of New York*, 1862) claims for personal torts were held not provable.

In re Boston & Fairhavre Iron Works, 23 *Fed.* 880, (*Circuit Ct. of Mass.*, 1885), a claim for damages for infringement of a patent was held not provable. Finally *In Re Schuchardt*, *Fed. Cases*, 12,483 (*Dist. Ct. of New York*, 1876), in a case almost on all fours with the present case, a claim for tort of precisely the character here set out, was held not provable. In that case the creditors claimed as here, to have been induced to extend credit to a bankrupt firm by the fraudulent representations of one of the

members of the firm, and asserted a right to prove a claim against the individual estate of that individual member. To this Judge Blackford said (21 *Fed. Cases*, p. 742) :

"Independently of this, the claim set up is a claim for damages for a tort, and is not a claim provable in bankruptcy. If it had been put in judgment against Mr. Schuchardt, individually, before the adjudication, the judgment might have been proved. The claim is not one made provable by sections 5067 and 5071 of the Revised Statutes. It is not a claim created by contract and, therefore, is not a debt within section 5067. Nor is it, within that section a demand for or on account of goods or chattels wrongfully taken, converted or withheld. Nor is it a claim for unliquidated damages arising out of a contract or promise, or on account of goods or chattels wrongfully taken, converted or withheld. Nor is it a contingent debt or a contingent liability, within section 5968. Nor can it be proved under any one of the other three sections above named. No contract can be implied between Agnew & Sons and Mr. Schuchardt, as might be the case if Mr. Schuchardt had received from Agnew & Sons money which *ex aequo et bono* ought to be refunded. The parties held no such relation as raise the implication in law, of a contract. Agnew & Sons paid no money to Mr. Schuchardt or to Schuchardt and Sons or to any agent of either. Therefore no action for money had and received could be against Mr. Schuchardt. The action would be for deceit, for a tort, and would sound in damages, and they would not be damages arising out of a contract or promise. The claim, therefore, is not a provable one.

"The proof of claim must be expunged."

That case is indistinguishable from this case, and the decision is the more interesting because in the argument before the Referee (to which we shall hereafter advert more particularly) counsel for Muller, Schall & Company claimed that Section 17 of the present Bankruptcy Act (relating to the effect of discharges) enlarged the list of claims provable under Section 63 of the present Bankruptcy Act, just as (as counsel then contended) Sec. 33 of the Bankruptcy Act of 1867 (which corresponds to Section 17 of the present act) enlarged the class of cases provable under Section 19 of the Act of 1867. See page 2 of memorandum filed by claimants' counsel before the Referee. *In re Schuchardt* is direct authority against this argument; because if section 33 of the Act of 1867 had been construed to enlarge the class of provable claims, the claim there set up by the creditors would have been admitted to proof, because it was a claim for fraud just as much within Section 33 of the Act of 1867 as the present claim for fraudulent misrepresentation is within Section 17 of the Act of 1898 as amended in 1903. But the Court held squarely that the claim was not provable because sounding in tort, thus showing that under the Act of 1867, as under the present act, the authority for proving a claim had to be found in the sections of the law defining provable claims, and not in those sections pertaining to discharges.

But on this proposition we have not only the authority of the District Court sitting in New York under the Act of 1867; we have a decision of this Court itself.

See *Strang v. Bradner*, 114 U. S. 555 (1885.)

In that case the creditors had been induced to send to the bankrupt firm certain notes, signed by the creditors, upon which the bankrupt firm had borrowed money. They had been induced to do this by a fraudulent misrepresentation of a member of the bankrupt firm to the effect that it had been impossible to use other notes which had been sent them for the same purpose. (and which had in fact been used). After the firm and the individuals had received their discharges in bankruptcy the creditors brought suit against the individual members of the firm, who thereupon pleaded their discharge. The Supreme Court said:

"To this proposition there are two answers: 1. While the plaintiffs might have based their claim entirely upon the legal obligation of defendants to take up the notes at their respective maturities, they were not bound to waive their right to proceed against the defendants for damages on account of fraud in procuring their execution. This action is brought to recover damages for the deceit practiced upon the plaintiffs. The claim here asserted is not one from which the bankrupts are protected by their discharge; for it is not a claim provable against their estates in bankruptcy. *Rev. Stat. Sections 5067 5072, inclusive, 5117, 5119.*"

This, then, again is direct authority showing that under the Act of 1867, Section 33 (corresponding to the present Section 17 of the present act), providing that claims for fraud were not discharged, was **not** construed to enlarge the classes of provable claims under the preceding sections. This case again is direct authority against the claimants' argument, as well as direct authority that a

claim of this character, under substantially similar wording in the Act of 1867 was not provable against an individual estate. If these precisely similar claims were held not provable against the individual estate of the individual partners under the Act of 1867 in these two decisions, *In re Schuchardt* and *Strang v. Bradner*, then the present claim of Muller, Schall & Company to make precisely similar proof against the individual estates should fail; for, as we have pointed out, the language of the present Act of 1898, as amended in 1903, is similar in this regard to the language of the Act of 1867. If Section 33 was not construed to enlarge the list of provable claims under that act, Section 17 cannot be so construed under the present act.

Under the English bankruptcy acts claims of the character here presented are not and never have been provable. See *Halsbury's Laws of England*, Vol. 2, p. 197, where it is said:

"There are three classes of debts and liabilities which are not provable in bankruptcy, namely: (1) demands in the nature of unliquidated damages which arise otherwise than by reason of a contract, promise or breach of trust; (2) debts and liabilities contracted by the debtor with a creditor who has notice of an available act of bankruptcy; (3) contingent debts and liabilities which in the opinion of the Court are incapable of being fairly estimated (g).

"As to the first of the above classes, the unprovable liabilities include damages for assault and battery, for trover, for seduction, and for **misrepresentations** in the prospectus of a company."

Counsel in their brief filed in this Court claim to derive support for the contention that the claims against the individual estates are provable from the case of *Ex Parte Adamson; In re Collie*, L. R. 8 Ch. Div. 807. In that case Adamson had made large advances to A. & W. Collie, merchants trading in London, and at Manchester under the firm of Alexander Collie & Company. These advances had been made upon the understanding that they were to be applied to the purchase of cotton for the joint account of Adamson and the Collie firm and the representation of the Collies that they were so applied. It appeared that as a matter of fact very little cotton was purchased, and that the moneys advanced by Adamson had been diverted to other purposes. It does not appear clearly from the statement of the case whether or not the partners individually benefitted by the fraud, although we think the implication to be that they did. It was held by a divided Court (two to one) that proof might be made by Adamson against the individual estates of the two Collies, but **only upon his withdrawal of proof against the partnership.**

Four observations at once suggest themselves regarding this case :

(1) It does not clearly appear that the individual partners did not individually benefit by the fraud, in which case an implied contract would be properly raised against their estates. In both the cases cited by the majority of the Court in support of their decision (*Read v. Bailey*, 3 App. Cas. 94; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. Div. 394) the individual enrichment of the defendants

against whom the claims were made was shown. In *Phosphate Sewage Co. v. Hartmont*, it was held that "the trustees who received money in the nature of a bribe for neglecting their duty must **repay what they had so received.**"

In the present case, not only do the proofs of claim filed by Muller, Schall & Company fail to make even a *prima facie* showing that the individual estates benefitted or were enriched in any way; but the record contains affirmative proof, and, indeed, the admission of petitioners' counsel that the individual estates did not so benefit and did not receive any of the moneys advanced by Muller, Schall & Company to the partnership.

(2) The fraudulent representations were admittedly made directly by the individual partner, Alexander Collie.

(3) The proof by Adamson against the individual estates was permitted only upon withdrawal of his claim against the joint estates.

(4) As already noted, the decision in *Ex Parte Adamson* was by a divided Court and the dissenting Justice (Bramwell, L. J.) rendered a pointed opinion in the course of which he said:

"Claims founded on tort are not provable; nothing is provable but those claims which arise out of contract. The Bankruptcy Act, Sect. 1, says: 'Debt provable in bankruptcy shall include any debt or liability by this Act made provable in bankruptcy.' Sect. 31 says: 'Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bank-

ruptcy.' If that was all, it might be said that this is not a demand in the nature of unliquidated damages and therefore not prohibited. True, it may not be thereby prohibited, but the next clause is 'save as aforesaid all debts and liabilities,' etc., shall be deemed to be debts provable, and 'liability' is afterwards said to include a variety of matters all of which suppose an express or implied contract. There are, no doubt, provable debts where there is no contract, as a debt on a judgment. But in such cases the law implies a duty to pay it. But, certainly, till the present case, it was never supposed that a claim for a wrong was provable, or that the discharge of the bankrupt released him from such a claim. Would the discharge of these bankrupts discharge them from an action against them in the form of the old suit in Equity for a joint and several decree for payment of money? The proof against the separate estate in *Read v. Bailey*, 3 App. Cas. 94, was the proof of a debt. The proof in *Phosphate Sewage Co. v. Hartmont*, 5 Ch. Div. 394, was ordered without the question being mooted as to whether the ground of fraud in the case prevented the proof. The proof against the separate estate of the infant obligor of a joint and several bond was allowed, because it was a joint and several bond, and he was held to be bound by it. Breaches of trust are provable against joint or separate estate, because, I suppose, trustees are held to undertake jointly and severally for the performance of their duties, not because there is fraud in breach of trust. There may be a breach of trust where in all good sense there is no pretence of saying there is fraud. To my mind, then, the present claim is contrary to principle, contrary to the statute, and without pre-

cedent. Mr. Justice Lindley's opinion is clearly against it."

Leave was given to the Trustee to appeal to the House of Lords, but the appeal does not appear to have been taken and the case must have been disposed of out of Court and is therefore of no final authority.

In *In re J. & H. Davison; Ex Parte Chandler*, 13 Q. B. Div. 50, relied upon by petitioners, it was also assumed that the claim against the individual estate could be supported only upon proof that the individual partner had himself misappropriated the moneys of the creditor. In that case also it was made a condition of proof against the separate estate that the claim against the partnership estate should be withdrawn.

That the English law does not in fact permit the proof of claims for false representations or upon the circumstances appearing from the claims of Muller, Schall & Company here as against the individual estates here, i. e., without any showing that the individual partners personally misappropriated funds so as to enrich their personal estates, is demonstrated by English decisions not cited by petitioners.

In *In re Giles; Ex Parte Stone*, 61 Law Times Rep. 83, (decided eleven years after *Ex Parte Adamson*), claim was made against the individual estate of Giles, a director of a company for damages for issuing a fraudulent prospectus on the faith of which S, the claimant, had been induced to accept debentures in the company, the claim being thus based on false representations (just as the pres-

ent claim of Muller, Schall & Company against the individual estates of LeMore and Carriere is so based). It was held that the claim was not provable. The opinion of Cave, J., summarizing the case, reads as follows:

"I am of the same opinion. Counsel rested his case on *Ex Parte Adamson*; *Re Collie* (*ubi sup.*) and *Jack v. Kipping* (*ubi sup.*). They both are based on this principle; that if a man is guilty of a fraud and by that means **gets into his own pocket** the money of persons whom he has defrauded, those persons are at liberty to prove for the amount of the money **which has thus come into the hands of the man who has defrauded them**. That principle does not apply here, for the benefit has not gone into the pocket of the directors, but of the company. This then is a mere unliquidated damage, which does not arise on contract, promise, or breach of trust: and as it does not arise out of fraud, as explained in *Ex Parte Adamson*, it is not provable, as the judgment was not obtained until after the receiving order."

It will be noted that the rule in *Ex Parte Adamson* (cited by petitioners here) was invoked by claimants in this case but was held inapplicable because the benefit had not gone into the pocket of the individual directors, but of the company. It was therefore held that the claim sounded purely in tort and there was no basis for the raising of an implied promise or contract.

That is precisely the situation in this case. The benefit here did not go into the individual pocket of either Carriere or LeMore, but went into the treasury of the partnership, which under the bankruptcy act (as also under the Louisiana law) is a distinct entity. It is moreover true, as

a matter of fact, that neither LeMore nor Carriere personally, nor their individual estates, received any of the money loaned by Muller, Schall & Company to the partnership. Indeed, as pointed out above, the proof of claim filed by Muller, Schall & Company does not even make any claim or showing that the individual partners or their individual estates benefitted in any way from the transactions recited in the proofs, and at the hearing before the Referee counsel admitted that it was not claimed that the partners individually had received any of the moneys loaned by Muller, Schall & Company to the partnership. (Record, page 27.)

The decision in *In re Giles* is a direct authority to indicate that the rule in England would be precisely that for which we here contend, and that in that country, as in this, no proof on the ground of implied contract or breach of trust could be maintained against the individual estates upon the facts here presented. It is also a direct authority against the application of *Ex Parte Adamson*, upon which petitioners rely, to the circumstances of this case.

Further evidence that the English law does not allow proof of claims based upon false representations is found in *Ex Parte Baum*; *In re Edwards*, L. R. 9 Ch. App. 673, where a claim for misrepresentations contained in a letter written by the debtor was held not provable in bankruptcy. In that case the creditor had instituted an action at law against the debtor to recover damages for misrepresentations contained in a letter written by the debtor on the faith of which the creditor had made advances by discounting bills. The debtor went into bankruptcy and ap-

plied for an order to restrain the prosecution of the suit on the ground that it involved a provable claim. The Court declined to grant the injunction. At page 676, after quoting the 31st section of the Bankruptcy Act of 1869 (corresponding to the 37th section of the present Bankruptcy Act of 1883), the Court said:

"It is therefore clear that damages for false representation are not provable and that the court of bankruptcy has no jurisdiction to restrain the action for fraud or misrepresentation. * * * *

"Now it is clear that some of the counts profess to be counts for damages for misrepresentation; and assuming that the letter of the 14th of January, 1871, amounts to a false representation, it may be proved that such false representation, was to be prejudice of the persons who discounted the bills; and if so, it will be a cause of action for damages **which cannot be proved in bankruptcy.** It is, of course, material to the person who discounts bills that the drawer should be honorable and respectable, so that if the acceptor fails, he may have a remedy against the drawer. Whether this false representation will be proved or not I cannot say, but this court has no power to restrain the plaintiffs from bringing action on that ground."

This again is direct authority against the maintenance even under the English law of the claims for false representation presented here against the individual estates.

The general English rule as to the non-provability of torts is further stated in *In re Newman; Ex Parte Brooke*, L. R., 3 Ch. Div. 494.

IV.

**CLAIMS IN TORT ARE NOT PROVABLE UNDER THE
PRESENT BANKRUPTCY ACT; SECTION 63b
ADDS NOTHING TO THE CATALOGUE OF
PROVABLE CLAIMS CONTAINED IN SECTION
63 a.**

So much for the earlier Bankruptcy Acts of this country and the bankruptcy laws of England. Under none of them has a claim in tort of the sort here presented ever been provable. The result, as is to be expected, is the same under our present law.

The provisions of the present bankruptcy Act defining "provable claims", are contained in Section 63, which reads as follows:

"Sec. 63. Debts Which May Be Proved.—a.

Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the peti-

tion in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

"b. Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

A careful examination of the various classes of claims which are set out under the numbers (1), (2), (3), (4) and (5) of the first paragraph of Section 63, as comprising the debts which may be proved and allowed, indicates that claims for torts do not fall within any of them. This is admitted. It would seem to follow, unanswerably, that the present Bankruptcy Act, like its predecessors, does not contemplate the proof of claims for tort.

The present claimants, like other claimants before them, seek to avoid this result by the argument that paragraph b of Section 63 was intended to create an additional class of provable claims, under the general heading of "Unliquidated Claims," which would be broad enough to cover tort claims.

To this contention, there are the following answers:

(1) The contention would make the elaborate provisions of paragraph a of Sec. 63 unnecessary and meaningless. If Congress had meant, by paragraph b, to create a

broad class of provable claims, without any restriction whatsoever as to their character, Congress might, more simply, and with less waste of time and space, have provided in Section 63 that all claims of every character, both liquidated and unliquidated, should be provable claims. It would be difficult to suggest or imagine any class of claims which would not be provable if paragraph **b** is considered to add to the list of provable claims.

As said in *In re Hirschbaum*, 104 Fed. 69, at p. 70:

"Assuming petitioner's construction of sub-section 'b' it would embrace claims arising from any cause. There is no language in the section which can be held to include some and not all torts, yet the general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs. It is hardly possible if Congress had intended such a departure from the history of bankrupt legislation that it should not have expressed the intent unmistakably."

(2) If paragraph **b** of Section 63 is designed to add to the list of provable claims, then contingent claims will be provable under 63-**b**, because they certainly come under the general heading of "Unliquidated Claims"; but it is unanimously agreed that contingent claims are not provable in bankruptcy.

See *In re Jerolleman Oliver Co.*, 213 Fed. 625 (C. C. App. for Second Circuit, 1914); *In re Roth & Appel*, 181 Fed. 667; 31 L. R. A. (N. S.) 270; *Colman v. Withoff*, 195 Fed. 250.

(3) The enumeration of provable claims in paragraph **a** itself includes some unliquidated claims, i. e., particularly those which fall within subdivision (4) and are "founded upon an open account or upon a contract, express or implied." To interpret paragraph **b** as an independent provision intended to include all unliquidated claims provable would be to make meaningless the careful enumeration in paragraph **a** of certain classes of unliquidated claims as provable.

Counsel for claimants recognize this difficulty and seek to avoid it by an attenuated argument based upon a supposed application of the maxim "*noscitur a sociis*". They suggest that the application of this maxim would permit the restriction of cases falling within subdivision (4), founded upon an open account or a contract, express or implied to liquidated claims.

The first answer to this suggestion is that not only does subdivision (4) include unliquidated claims, but subdivisions (1), (2) and (3) may also involve claims unliquidated in amount, which would have to be liquidated and fixed.

The second answer to the suggestion is that the very words "open account" in subdivision (4), in themselves irresistibly imply an unliquidated claim.

6 *Words & Phrases*, 4985:

"An 'open account' is one in which the amount due has not been ascertained or fixed either by the act and agreement of the parties or by operation of law.

Nisbit v. Lawson, 1 Ga. 275; *Anderson v. State*, 2 Ga. 370; *Hargraves v. Coole*, 15 Ga. 321."

3 *Words & Phrases* (2nd Ed.), 738:

"An 'open account' is one in respect to which nothing has occurred to bind either party by its statements; an account which is yet fully open to be disputed. *Wooten Grain & Lumber Co. v. Mineola Box Mfg. Co.*, 95 S. W. (Tex.) 744, citing *McCainant v. Bastell*, 59 Tex. 363; *Abb. Law Dict.*; *Wittlesey v. Spofford*, 47 Tex. 13."

The maxim "*noscitur a sociis*" cannot be employed to change the plain meaning of the language of the subdivision.

Brown v. Chicago & N. W. Ry., 102 Wis. 137, 78 N. W. 771, 44 L. R. A. 57:

"'*Noscitur a sociis*' is not a rule of interpretation by which the meaning of one word or designation, or that of several, used in close connection, governs in determining the meaning of other words or designations used in the same connection. You may know a person by the company he keeps. You may know the meaning of a term by its associates—what precedes, what follows it. When? Not in every case; but when not apparent from the language itself. **It is a rule of construction to be resorted to where there is use for construction, not otherwise.**"

Finally, that subdivision 4 of Section 63-a does in fact include unliquidated claims, and cannot be confined to liquidated claims, as counsel for claimants so laboriously contend, is squarely indicated by the latest decision of this

Court upon this subject. See *Central Trust Company v. Chicago Auditorium*, 240 U. S. 581, where the Court held that a claim for damages for the anticipatory breach of an executory contract, was provable in bankruptcy. At page 592, the Court said:

"The claim for damages by reason of such a breach is 'founded upon a contract, express or implied,' within the meaning of Section 63a-4, and the damages may be liquidated under Section 63b."

This is a square decision that Section 63a-4 includes unliquidated claims which would have to be liquidated under Section 63b.

This is also a square decision that paragraph **b** of Section 63 was not intended to create a new class of provable claims in addition to those carefully enumerated in paragraph **a**, but was designed merely to provide for the method of liquidating claims which fell within paragraph **a**. Otherwise, it would have been unnecessary for the Court to say that the claim fell within paragraph **a-4**.

It is impossible, therefore, successfully to argue that paragraph **a** does not contain elaborate provisions for certain unliquidated claims, i. e., those based upon open accounts and contracts, express or implied, as well as those falling within subdivisions (1), (2) and (3). It is equally impossible, therefore, with any logic, to contend that paragraph **b** was intended by Congress, after the elaborate specification in paragraph **a** to make all unliquidated claims, of every sort, provable.

(4) The arrangement of Section 63 negatives the contention that paragraph **b** was intended to create an entirely **new and limitless chain of provable claims in addition to** those laboriously enumerated in paragraph **a**. The symbol "**a**" precedes, and does not follow, the sentence:

"Debts of the bankrupt may be proved and allowed against his estate, which are (1) * * *; (2) * * *; (3) * * *; (4) * * *; and (5) * * *."

Paragraph **b** begins an entirely new sentence, reading:

b. Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

If it had been the intention of Congress to create, in paragraph **b**, an entirely new and additional class of provable claims, the natural and proper arrangement of the section would have been to make the symbol "**a**" follow the first sentence in the section, instead of precede it, so that the arrangement would have been:

"**Debts which may be proved.** Debts of the bankrupt may be proved and allowed against his estate, which are:

a. (1) * * *; (2) * * *; (3) * * *; (4) * * *; and (5) * * *."

b. Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Such an arrangement would have indicated an intention in Congress that the cases listed under paragraph **b** should

be considered as co-ordinate with, and in addition to, the cases listed in paragraph a. But such is not the arrangement; and the arrangement which actually exists indicates that Congress intended, by paragraph b, not to extend the classes of provable claims which were so elaborately and carefully worked out in paragraph a, but merely to provide for the manner in which unliquidated claims falling within the carefully worked out classes enumerated in paragraph a might be reduced to precise sums. The arrangement of Section 63 corresponds to that of Section 19 of the Act of 1867 under which tort claims were repeatedly held not provable. (See Section 19 in appendix hereto.)

Petitioners claim that the strained construction of 63-a for which they contend derives some support from subdivision (5) of that section, which reads as follows:

"(5) Founded upon provable claims reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge less the costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment."

Petitioners contend that except upon their construction there is no reason for this subdivision and it is meaningless.

This contention is fully met and the explanation of the insertion of subdivision (5) is fully stated by Mr. Collier (11th Ed., p. 973):

"This clause gives statutory recognition to the doctrine in *Boynton v. Ball* (121 U. S. 457) which

settled the controversy under the law of 1867 that outlasted the statute itself. The contention was that the debt, being merged in the judgment, and the latter postdating the bankruptcy, became a new debt which could not be proved and was therefore not discharged. There can now be no doubt. The debt whether merged or not—and it seems it is not—may be proved in the form of the judgment, provided costs and interest after the bankruptcy are credited. But the judgment must (1) be founded upon a provable debt and (2) be entered before the consideration of the bankrupt's application for a discharge, i. e., before the debt on which the show cause order returnable thereon is called and heard. **This provision manifestly does not include liabilities for torts."**

The true explanation of subdivision (5) therefore is the controversy which arose under the act of 1867 as to whether the word "debt" would cover a judgment. It was to set this controversy finally at rest and to give legislative recognition to the decision in *Boynton v. Ball*—and for that purpose only—that the subdivision was added.

It thus clearly appears that the subdivision has a *raison d'être* more real and substantial than the inferences which are laboriously sought to be drawn by claimants.

The foregoing considerations have led **every** court which has been called upon to decide the question under the present Bankruptcy Act, **without exception**, to hold that paragraph b of Section 63 was not intended to, and did not, enlarge the class of provable claims as enumerated in paragraph a of that section.

See *Dunbar v. Dunbar*, 190 U. S. 340, where the Court, speaking through Mr. Justice Peckham, said, at page 350:

"In Section 63-b, provision is made for unliquidated claims against the bankrupt which may be liquidated, upon application to the Court, in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph b however, adds nothing to the class of debts which might be proven under paragraph a of the same section. Its purpose is to permit an unliquidated claim coming within the provisions of Sec. 63-a, to be liquidated as the Court shall direct."

In *In re Southern Steel Company*, 183 Federal, 498, (1910), Judge Grubb, of the Northern District of Alabama, said:

"The contention of the petitioner that subdivision 'b' of Section 63 extends the scope of provable debts beyond those classified in the five subdivisions of subdivision 'a' of that section, is, as stated in his brief, left undecided by the Supreme Court in the case of *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147. However, in the case of *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, that Court, through Justice Peckham, said (page 350 of 190 U. S., page 761 of 23 Sup. Ct. 47 L. Ed. 1084):

"In Section 63b, provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the Court in such manner as it shall direct, and may thereafter be proved and allowed against the estate. This paragraph 'b', however, adds nothing to the class of debts which might be proved under paragraph 'a'

of the same section. Its purpose is to permit an unliquidated claim, coming within the provision of Section 63a, to be liquidated as the Court should direct."

In *In re Hirschbaum*, 104 Fed. 69, the Court said:

"Bankruptcy Act 1898, Section 63, subsection 'b', which provides for the liquidation by the Court of unliquidated claims against the bankrupt, and that they may thereafter be proved against his estate, covers only such claims as, when liquidated, are provable debts under the specifications of the preceding subsection 'a', and does not authorize the liquidation and proof of claims arising *ex delicto*, unless they are of such a nature that the claimant might, at his election, waive the tort, and recover in *quasi contract*."

At page 70 the Court said:

"The intent of Congress was to specify in subsection 'a' all provable debts, and in subsection 'b' to provide for the liquidation of such as, falling under subsection 'a', were yet unliquidated. This was to prevent the construction of this act in the way the older bankrupt acts in England were construed. Under those acts unliquidated damages, although arising *ex contractu*, were held not to be provable debts, because the statutes seemed to require the creditor to swear to a precise sum. *Lee & Chapman's Case*, 30 Ch. Dic. 216. The care used to particularize various provable debts in subsection 'a' negatives the extended construction of subsection 'b' urged by petitioners. If the latter subsection authorizes the liquidation and subsequent proof of damages *ex delicto* the whole subject could have been covered in

very general language. Assuming petitioners' construction of subsection 'b', it would embrace claims arising from any tort. There is no language in the section which can be held to include some, and not all, torts. Yet the general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs. It is hardly possible, if Congress had intended such a departure from the history of bankrupt legislation, that it should not have expressed the intent unmistakably."

In *In re Filer*, 125 Fed. 261, it was again recognized that a claim for tort was not provable and that no proof could be made unless the circumstances were such that the tort could be waived and the claim made upon implied contract.

Pindel v. Holgate, 221 Fed. 342, 349 (Circuit Court of Appeals, Ninth Circuit, 1915) :

"Section 63 defines the claims which may be proved, and provides in subdivision 'b' that 'unliquidated claims against a bankrupt may, pursuant to application to the Court, be liquidated in such a manner as it shall direct and may thereafter be proved and allowed against the estate'; but this provision is held not to enlarge the scope of subdivision 'a' and unliquidated claims arising out of torts, such as are here relied upon, are not covered by subdivision 'a'. See *Remington on Bankruptcy*, pars. 704, 705, 706, and cases cited thereunder."

In *In re Mullings Clothing Co.*, 238 Fed. 58, 67 (Circuit Court of Appeals, Second Circuit, 1916) :

"The Bankruptcy Act in Section 63a specifies the debts which may be proved and allowed against the bankrupt's estate. There are five classes of debts so specified. We are not now concerned with any of them except the fourth, which reads:

"Those founded upon an open account, or upon a contract express or implied."

"It is true that Section 63b provides that:

"Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

"This, however, relates merely to procedure, and does not define an additional class of debts which are provable. In *Dunbar v. Dunbar*, 190 U. S. 340, 350, 23 Sup. Ct. 757, 761 (47 L. Ed. 1084, 1093) the Supreme Court declared that:

"That paragraph * * * adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of Section 63a, to be liquidated as the Court should direct."

Switzer v. Henking, 158 Fed. 784 (Circuit Court of Appeals Sixth Circuit, 1908):

"The sole question presented is whether the claim, as stated, is provable. If provable, it must be under subsection 4 of Section 63-a of the Bankrupt Act which provides for proof of debts founded 'upon a contract, express or implied,' in connection with the provision in that section for the liquidation of unliquidated claims prior to proving and allowance."

Moore v. Douglas, 230 Fed. 399, 400, 401 (Circuit Court of Appeal, Ninth Circuit, 1916):

"Section 63a of the Bankruptcy Act, in providing for debts which may be proved, includes:

"(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest' '(4) founded upon an open account, or upon a contract express or implied.'

"When we read this section with 63b, we find that by the latter, provision is made for unliquidated claims against a bankrupt, which may be liquidated upon application to the Court in such manner as it shall direct and may thereafter be proved and allowed against his estate. It is thoroughly established that paragraph 'b' does not enlarge the class of debts which may be proved under paragraph 'a'; it does, however, permit an unliquidated claim to be liquidated as the Court may direct, provided, always, such claim is one within the provision of 63-a. *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084."

In re Roth & Appel (Circuit Court of Appeals, 2nd Circuit, 1910), 181 Fed. 667, 31 L. R. A. (N. S.) 270, at 277, the Court said:

"The present bankruptcy statute, unlike, as we have seen, the acts of 1841 and 1867, does not pro-

vide for the proof of contingent claims. Taking the fourth subdivision of Paragraph 63a as being independent of the first subdivision, still there is nothing to indicate that it was intended to embrace wholly contingent demands. Indeed it is only by reading Paragraph 63b, which permits the liquidation of unliquidated demands, in connection with said fourth clause of 63a, that any ground is shown for contending that a claim like the one in question can be proved. But this construction expands the provisions of Paragraph 63b, and it is well settled that such a construction cannot be adopted. Section 63b adds nothing to the class of debts provided under 63a. It merely permits the liquidation of an unliquidated claim provable under the latter provision."

In *In re Crescent Lumber Company*, 154 Fed. 724 (1907):

"An action by a servant against a master to recover damages for a personal injury alleged to have been caused by the master's negligence, brought under the Alabama employers' liability statute (Code Ala., 1896, Sec. 1749), is one sounding in tort, and not one based upon the contract of employment, and a judgment recovered in such an action brought after the defendant had been adjudged a bankrupt is not provable against the estate under Bankr. Act July 1, 1898, Sec. 63a (4), c. 541, 30 Stat. 562 (*U. S. Comp. St.* 1901, p. 3447), as a debt founded upon a contract."

The authorities are fully collected in the notes to the recently published *Second Edition of Federal Statute An-*

notated (1917) Volume 1, pp. 1074, 1075, where the law is thus summarized:

"Claims capable of liquidation and proof

"In General. Under Section 63b any unliquidated claim which at the time of the filing of the petition in bankruptcy was provable as within the enumeration of provable claims set out in Section 63a in its several subdivisions may be liquidated and proved against the bankrupt estate. But unliquidated claims which are not provable debts under Section 63-a cannot be liquidated or proved under Section 63b, *Dunbar v. Dunbar*, (1903), 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. Ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Hirschman* (D. C. Utah, 1900), 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re Marcus* (C. C. A. 1st Cir. 1901), 105 Fed. 907, 5 Am Bankr. Rep. 365; *In re Yates* (N. D. Cal. 1902), 114 Fed. 365, 8 Am. Bankr. Rep. 69; *In re United Button Company* (D. C. Del. 1906), 140 Fed. 495, 15 Am. Bankr. Rep. 390; *Brown v. United Button Co.* (C. C. A. 3rd Cir. 1906), 149 Fed. 48, 9 Am. Cas. 445, 17 Am. Bankr. Rep. 565; *In re New York Tunnel Co.* (C. C. A. 2nd Cir. 1908), 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Pittsburg Drug Co.* (W. D. Pa. 1908), 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Rubel* (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 596; *In re Roth* (C. C. A. 2d Cir. 1910), 181 Fed. 667; *In re Southern Steel Co.* (N. D. Ala. 1910), 183 Fed. 498; *In re Filer*, (S. D. N. Y. 1901), 9 Am. Bankr. Rep. 582; *Matter of Jahn Wigmore, etc., Co.* (S. D. Cal. 1903), 10 Am. Bankr. Rep. 664; *In re American Vacuum Cleaner Co.* (D. C. N. J. 1911), 192 Fed. 939; *Pratt*

v. Auto Spring Repairer Co. (C. C. A. 1st Cir. 1912), 196 *Fed.* 495; *Cotting v. Hooper* (1905), 220 *Mass.* 273, 107 N. E. 931.

"Section 63b adds nothing to the class of debts which may be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of Section 63a, to be liquidated as the Court may direct. *Dunbar v. Dunbar* (1903), 190 U. S. 340, 23 Ct. 757, 47 U. S. (L. Ed.), 1084, 10 *Am. Bankr. Rep.* 139; *In re Roth* (1910), 181 *Fed.* 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270.

"As contradistinguished from the paragraph which precedes it, Section 63b is concerned with the mere matter of procedure, directing how a provable claim which is open and unsettled may be liquidated and made certain; and whether taken by itself, or with reference to the immediate context, this is the natural, if not the only, construction to be given to it. *Brown v. United Button Co.* (C. C. A. 3d Cir. 1906), 149 *Fed.* 48, 9 *Am. Cas.* 445, 17 *Am. Bankr. Rep.* 565; *In re New York Tunnel Co.* (C. C. A. 2d Cir. 1908), 159 *Fed.* 688, 20 *Am. Bankr. Rep.* 25.

"Liquidation of Claim for Tort. A claim arising *ex delicto*, if founded on contract express or implied, may be proved in bankruptcy proceedings, and the cases to this effect have been collected under subdivision a (4) of this section. But a claim for tort, which does not result from the breach of contract or which may not be waived so as to warrant a recovery on an implied contract, cannot be liquidated or proved against a bankrupt's estate under Section 63b, for the reason that such a claim is not a provable one under section 63a. *Beers v. Hanlin* (D. C.

Ore. 1900), 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Hirschman* (D. C. Utah, 1900), 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re Morales* (S. D. Fla. 1901), 105 Fed. 761; *In re Yates* (N. D. Cal. 1902), 114 Fed. 365; *In re Filer* (S. D. N. Y. 1901), 125 Fed. 261, 5 Am. Bankr. Rep. 835; *In re United Button Co.* (D. C. Del. 1906), 140 Fed. 495, 15 Am. Bankr. Rep. 390, affirmed (C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, and note; *In re Crescent Lbr. Co.* (S. D. Ala. 1907), 154 Fed. 724, 19 Am. Bankr. Rep. 112; *In re New York Tunnel Co.* (C. C. A. 2d Cir. 1908), 159 Fed. 688, 20 Am. Bankr. Rep. 25; *Pindel v. Holgate* (C. C. A. 9th Cir. 1915), 221 Fed. 342. See also *In re Marcus* (1900), 104 Fed. 331, where the Court said: 'Probably the unliquidated claims mentioned in subsection b are those claims already mentioned in subsection a which have not been liquidated.' *In re Brinckmann* (D. C. Ind. 1900), 4 Am. Bankr. Rep. 551; *Matter of John Wigmore, etc., Co.* (S. D. Cal. 1903), 10 Am. Bankr. Rep. 664; *Zimmer v. Schleeauf*, (1874), 155 Mass. 52; *Gilman v. Cote* (1884), 63 N. H. 278; *Winfree v. Jones* (1905), 104 Va. 39, 51 S. E. 153.

"An unliquidated claim for damages against the defendant for having negligently permitted a certain house to be burned while it was in his possession as tenant to the plaintiff, is a claim *ex delicto*, and is not provable in bankruptcy. *Winfree v. Jones* (1905) 104 Va. 39, 51 S. E. 153.

"A cause of action for unliquidated damages for a wilful and malicious injury to the person of the claimant is not a claim provable in bankruptcy. *In re Yates* (N. D. Cal. 1902), 114 Fed. 365.

"A cause of action for negligent injury to the person, being an unliquidated claim for damages, is not provable in bankruptcy. *Imbriani v. Anderson*, (1912) 76 N. H. 491, 84 Atl. 974."

The cases are thus numerous and unanimous to the effect that Section 63b does not enlarge the list of provable claims laboriously catalogued in Section 63a. The unanimous opinion of all the bankruptcy text writers, including Mr. Collier, upon whom counsel for claimants rely, is to the same effect.

See *Collier on Bankruptcy*, 11th Edition (1917), p. 976:

"b. **Effect and purpose of subsection.** Subsection **b** adds nothing to the class of debts which may be proved under subsection **a**; its purpose is to permit an unliquidated claim, coming under the provisions of subsection **a**, to be liquidated as the Court shall direct. It was not intended by the subsection to permit proof of contingent debts, liabilities or demands, the valuation or estimation of which it was substantially impossible to prove. The present prevailing opinion is that only debts coming within subsection **a** can be liquidated and no tortious liabilities may be, save on the theory of quasi contract."

See also *Black on Bankruptcy* (1914), Sec. 514; *Remington on Bankruptcy*, 3rd Ed. (1915), Sec. 635; *Brandenburg on Bankruptcy*, (1917 Ed.), Sec. 570; *Loveland on Bankruptcy*, 4th Ed. (1912), p. 668; *Corpus Juris*, (1917), 307.

It is most extraordinary that if counsel's interpretation of paragraph **b** of Section 63 is correct and if it creates an

additional and unlimited class of provable claims, not a single Court has so held in the twenty years during which the bankruptcy act has been in force.

V.

THE LIST OF PROVABLE CLAIMS AS ENUMERATED IN SEC. 63-a IS NOT ENLARGED BY THE PRECEDING SECTION 17 (EITHER AS THAT SECTION WAS ORIGINALLY ENACTED OR AS IT WAS AMENDED IN 1903).

In the attempt to support their position, the claimants have sought to contend that the list of provable claims as carefully enumerated in Section 63-a, is enlarged by the provisions of the **preceding** Section 17.

The argument appears to be that Section 63 is to be controlled by the preceding Section 17, and that the effect of Section 17 is to make tort claims provable under Section 63, although, if Section 17 were out of the law, they would not be provable independently under Section 63.

Section 17, prior to the amendment of 1903, read as follows:

"Sec. 17. Debts Not Affected By a Discharge.
a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are **judgments** in actions for frauds, or obtaining property by false pretence or false repre-

sentations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

As amended in 1903, the section reads:

"Sec. 17. Debts Not Affected by a Discharge.

a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are **liabilities** for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, **or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;** (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

The changes made by the amendment are indicated by our black letters.

The argument is that Section 17 includes claims which Section 63 does not cover, and that the enumeration in Sec-

tion 17 of claims which are discharged, must be taken as a declaration that all claims mentioned in Section 17 were considered provable even though not included in the careful enumeration contained in the specific Section 63 devoted to the definition of provable claims. Indeed counsel appear to contend that Section 17, by indirection, makes provable all torts—even those not mentioned—on the theory that it would have been unnecessary to specify certain torts as exempt from discharge if all torts were not considered provable.

In their original argument before the Referee, counsel for the claimants pitched their position entirely upon the proposition that this supposed enlargement of Section 63-a by the provisions of an earlier section of the law, had been effected only by the amendment of 1903 to Section 17. Thus at pages 3 and 4 of the brief of counsel for claimants submitted to the Referee, they said:

"We would not, and could not, claim that claims in tort for fraud would have been provable before 1903, and we base our rights to prove such claims squarely upon the language of Section 17 as amended, and the decisions of the United States Supreme Court in cases arising under it. * *"

It is not clear, from the language of their present brief, whether or not counsel still pitch their position entirely upon the amendment of 1903, or whether they now contend, notwithstanding their earlier concession, that tort claims were always provable under Section 17, even prior to its amendment. If, however, it is their present contention that tort claims were provable before the 1903 amendment, it is

sufficient to point out that by no possible construction of Section 17 as it stood prior to the 1903 amendment could any support be found for the argument that anything in its original language made tort claims provable. Prior to the 1903 amendment there was no language in Section 17 which could by any possibility be applied to unliquidated tort claims not reduced to judgment. Subdivision (4) of Section 17, referring to debts created by the bankrupt's fraud, embezzlement, misappropriation or defalcation, was expressly limited to cases arising while the bankrupt was acting in a fiduciary capacity. In all such cases, of course, the liability would be clearly contractual. So far as we know, it has never heretofore been suggested by anyone that Section 17 prior to the 1903 amendment lent any support to the view that unliquidated tort claims were provable. The only argument that has ever been suggested is that the 1903 Amendment accomplished that result; and that argument is fully met by the following considerations.

(1) Section 63 is the section particularly and specially devoted to the definition of provable claims. Section 17 relates only to the discharge of claims. Even if the provisions of Section 17 were apparently inconsistent with those of Section 63 (which they are not, as is hereinafter shown) the provisions of the section devoted to the special topic of provable claims, must control in determining what claims are provable.

See *United States v. Jackson*, 143 Federal 783, (Circuit Court of Appeals, 9th Circuit, 1906) :

"When one section of a statute treats specially and solely of a matter, that section prevails in ref-

erence to that matter over other sections in which only incidental reference is made thereto."

In *In re Rouse Hazard & Company*, 91 Federal 96, (Circuit Court of Appeals, 7th Circuit, 1899) :

"Specific provisions as to a particular subject in a statute are neither abridged nor enlarged by subsequent general provisions in the same statute which are broad enough to apply to the same subject."

Sutherland's Statutory Construction, Section 158 :

"It is an elementary principle of construction that where there are in one act or in several acts, contemporaneously passed, specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same act."

State v. Inhabitants of Trenton, 38 New Jersey Law, 67 :

"When the intention of the lawgiver, which is to be sought after in the interpretation of the statute, is specifically declared in a prior section as to a particular matter, it must prevail over a subsequent clause in general terms, which might, by construction, conflict with it. The Legislature must be presumed to have intended what it expressly stated, rather than that which might be inferred from the use of general terms."

State v. Goetze, 22 Wisconsin, 363-365 :

"There is no rule of construction more reasonable and none better settled, than that special provisions of the statute in regard to a particular subject, will prevail over general provisions in the same or other statutes, so far as there is a conflict."

26 *Am. & Eng. Ency. of Law* (2nd Ed.), 618:

"It is an old and familiar rule that where there is in the same statute a particular enactment and also a general one which, in its most comprehensive sense would include what is expressed in the former, the particular enactment must be operative, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

Assuming, therefore, that there was a conflict or an inconsistency between the provisions of Section 17 and Section 63, the specific provisions of the latter, devoted particularly to the definition and enumeration of provable claims, must prevail.

(2) Even if Section 63 were not entitled to control by virtue of the rule just stated, because of its specific and particular application to the subject, it would prevail over Section 17, in the event of any inconsistency, because Section 63 is the later section.

See *Ware v. Hylton*, 3 *Dallas*, 199, 233; *Alexander v. Alexandria*, 5 *Cranch*, 1; See also *Williams v. Railroad Company*, 142 *Georgia* 696, 83 *S. E.* 525; *Victoria v. Railroad Company*, 15 *British Columbia*, 43; *State v. Ure*, 135 *N. W.* 224.

(3) As a matter of fact, Section 17, upon a natural and reasonable construction, is entirely consistent with the provisions of Section 63, and, so construed, gives effect and meaning to all of the language of Section 63 and the specific

enumeration therein. On the other hand, to give Section 17 the construction for which counsel for claimants contend, will result in practically nullifying and **making meaningless** the careful enumeration and precise language of Sec. 63. Such a result, is, of course, opposed to the most elementary and fundamental rule of statutory construction which makes it the duty of a Court to so construe the various parts of the statute as to make them all consistent, intelligent and harmonious.

See 36 *Cyclopedia of Law and Procedure*, page 1128:

"It is a cardinal rule in the construction of statutes that effect is to be given, if possible, to every word, clause and sentence. It is the duty of the Court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each."

Montclair Twp. v. Ramsdell, 107 U. S. 147:

"The rule is that a statute ought to be so construed that, if possible, no clause, sentence, or word shall be superfluous, void or insignificant."

Peck v. Jenness, 7 How. 612:

"In construing a statute every section, provision, and clause should be expounded by reference to every other, and, if possible, every clause and provision be given and have the effect contemplated by the Legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and

limited by conditions and exceptions contained in another, so that all may stand together."

It will be noted that Section 17 specially provides for the exemption from discharge of all **provable** debts except those specially enumerated. This requires a reference to Section 63 to determine what are provable debts, because it is that section which is specifically devoted to the definition of provable debts. The exceptions stated in Section 17 are exceptions only from debts made provable by Section 63.

See *Friend v. Talcott*, 228 U. S. 27.

It is claimed that this cannot be so because (it is alleged) the exceptions stated in Section 17 include cases which could not by any possibility be provable under any of the classes enumerated under Section 63-a; whence it is argued that the exceptions in Section 17 must, necessarily, be considered as equivalent to an enactment that those exceptions shall be provable. This is, at best, another attenuated argument which would seek, by indirection, to twist Section 17 into a meaning which would make it control the specific and particular provisions of the later Section 63. At best, it would be difficult to support this; and it is a construction which no Court should adopt unless the language of Sec. 17 left no escape and absolutely demanded it. But, as a matter of fact, so far from absolutely demanding it, the language of Section 17, naturally construed, quite avoids it. It is **not** true to say that the list of exceptions set out in Section 17-a-(2) includes only claims which could not be provable under Section 63, and must, therefore, necessarily, enlarge Section 63. There are many cases un-

der Section 63-a-(4) which would include cases falling within subdivision (2) of Section 17-a, i. e., there are many claims arising on contracts, express or implied, which are liabilities for obtaining property by false pretenses or false representations, which would be discharged were it not for the exception in subdivision (2) of Section 17-a.

(4) The unsoundness of counsel's contention that every claim enumerated in subdivision 2 of Section 17-a was thereby indirectly made a provable claim, is further established by the decisions of this Court in *Audubon v. Schufeldt*, 181 U. S. 575, and *Wetmore v. Markoe*, 196 U. S. 63. In those cases, this Court held that judgments for alimony were not provable claims. Yet, Section 17-a (2) specifically excepts from a discharge claims for alimony due or to become due. According to counsel for Muller, Schall & Company, the effect of this is to make claims for alimony provable; but this Court would certainly have to reverse entirely the position assumed by it in the two cases cited in order to reach such a conclusion.

The fact is, of course, as indicated by the quotations hereinafter made from the report of the Committee on Judiciary, that in drafting Section 17-a, as amended, Congress and the committee did not have at all in mind the making of claims provable. They had only in mind a desire to be certain that claims of a particular character, if **they should be provable**, should, nevertheless, in no event, be covered by a discharge.

All of these considerations have led every Federal Court which has had the question squarely before it (being three

Circuit Courts of Appeal and two District Courts, or eleven Federal Judges in all) to decide that Section 17 does not enlarge the class of provable claims enumerated in Section 63.

The contention now made by claimants was presented some 12 years ago to the District Court of the United States for the District of Delaware, and in an elaborate and learned opinion, Judge Bradford held that the amendment of 1903 had not enlarged the list of provable claims.

See *In re United Button Company*, 140 Fed. 495 (1906).

The creditors were dealers in wool and carried on business in the premises adjoining those belonging to the bankrupts. The creditors claimed that the wool handled by them had been injured by reason of excessive heat passing from the bankrupts' premises into the claimants' warehouse, and the creditors contended that their claim for damages in this regard was made provable by effect of the amendment of 1903 to Section 17, which provided that "liabilities for wilful and malicious injuries to property" should not be barred by a discharge. It was argued in that case just as it is argued in this, that the effect of specifying in Section 17 that a particular claim should not be barred by a discharge, was to imply that that claim was provable. The Court first discussed the general question of whether the claim was provable under Section 63 of the Bankrupt Act, saying:

"Section 1 provides that the word 'debt' shall include 'any debt, demand or claim provable in bankruptcy', and Section 63-a (36 Stat. 563, U. S.

Comp. St. 1901, p. 3447) contains an enumeration of debts, demands and claims made so provable, and provides that 'debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract expressed or implied.' Clearly the alleged claim would not be provable by virtue of Section 63a, considered independently of the provisions of Section 63b and Section 17, unless and save insofar as it is founded upon 'a contract express or implied.' The claim, however, if any exists, is not based upon nor does it grow out of an expressed or implied contract. The only agreement or arrangement suggested was on the part of the trustee in bankruptcy, no breach of which could originate or support a claim against the bankrupt. On the facts as alleged no contract on the part of the bankrupt can be implied in fact, and no circumstances are disclosed giving rise to a contract implied in law or *quasi* contract. It does not appear that the tort-feasor obtained or derived from the petitioners through the commission of the tort any property for the value or proceeds of which it could be held liable under any *quasi*-contractual obligation. It is not like the case of wrongful conversion of personal property, where there is an election of remedies. The alleged claim is for a tort pure and simple. No election between a remedy *ex delicto* and one *ex contractu* was or is possible. *Keener on Quasi-Contracts*, 159, 160. The doctrine of 'waiver of tort' can have no application."

The Court pointed out that Section 63b could not be construed as enlarging the classes of provable claims as defined in Section 63a.

Coming then to the contention made in that case as it is made in this case, that Section 17, as amended in 1903, made claims in tort provable when they otherwise would not have been, the Court said:

"While it was the intention of Congress in enacting Section 17 to determine and declare the effect of a discharge in bankruptcy upon demands against the bankrupt provable against his estate, it reasonably may be assumed, in the absence of persuasive evidence to the contrary, that Congress did not intend in and by that section to render so provable demands not possessing that nature or quality under other provisions of the act. * * * The third classification in Section 17 has no relevancy to the point under discussion; but the fourth includes debts of claims against the bankrupt 'created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.' The fraud here mentioned is restricted to fraud on the part of the bankrupt while acting as an officer or in a fiduciary capacity, and the same statement *mutatis mutandis* is applicable to embezzlement and misappropriation. *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147. The commission of such torts usually involves contractual or quasi-contractual liabilities on the part of the wrongdoer, and whenever such is the case the liability constitutes a 'provable' debt or demand founded 'upon a contract express or implied.' The foregoing considerations render unnecessary any interpretation of Section 17 in its original form, which would impute to Congress an intent in and by that section to establish the provability of demands against the estate of a bankrupt. Indeed, such an

interpretation would have produced repugnancy between that section and Section 63, and have been calculated to embarrass the Court in the administration of the act. Provability of debts or claims in bankruptcy was not in whole or in part created by the provisions of Section 17 as it stood prior to the amendatory act, but was founded solely upon the provisions of Section 63. Demands to be provable must have conformed to the requirements of the latter section. In *Crawford v. Burke*, *supra*, where Section 17, before its amendment, was under consideration, the Court, through Mr. Justice Brown, said, at page 193 of 195 U. S., page 13 of 25 Sup. Ct. (49 L. Ed. 147): 'It certainly could not have been the intention of Congress to extend the operation of the discharge under Section 17 to debts that were not provable under Section 63a.' * * * It is highly improbable that Congress intended, by the mere substitution in Section 17 of 'liabilities' for 'judgments in actions', to render or recognize as provable all claims for torts, unliquidated as well as liquidated. I am not aware that Section 17 has been so construed in any judicial decision. Such an intent on the part of Congress would have been a clear departure from the settled policy of the whole body of bankruptcy legislation in the United States, beginning with the Act of 1800 and ending with that of 1898. It also would have produced glaring repugnancy between Section 17 and the limitation by Section 63a of provability to the classes of debts there enumerated. Injuries to 'the person or property of another', it must be conceded, when taken in a broad, unqualified sense, would embrace all torts; and if 'liabilities' for them were not restricted to such as are provable by virtue of Section 63a, the

limitation there found largely, if not wholly, would be nullified. Were all torts provable, as well as claims founded upon 'a contract express or implied,' and fixed liabilities, 'as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition,' etc., it would seem to have been more appropriate had Section 63a been framed in conformity with the radically different theory that 'taxable costs incurred in good faith by a creditor,' etc., and 'costs taxable against an involuntary bankrupt,' etc., and all other debts, demands and claims against the bankrupt existing at the time of filing the petition, should be provable against and allowable out of his estate. No construction of Section 17 resulting in such repugnancy should be adopted, if it can be avoided without doing violence to the language of the act. In *Lamp Chimney Co. v. Brass & Copper Company*, 91 U. S. 656, 663, 23 L. Ed. 336, where certain provisions of the bankruptcy act of 1867 were under consideration, the Court through Mr. Justice Clifford, used the following language:

" 'Words and phrases are often found in different provisions of the same statute, which if taken literally, without any qualification, would be inconsistent and sometimes repugnant, when, by a reasonable interpretation—as by qualifying both, or restricting one and giving the other a liberal construction—all become harmonious, and the whole difficulty disappear; and in such a case the rule is, that repugnancy should, if practicable, be avoided, and that, if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where a resort may be had to

construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the 'language of the lawmaker.' "

"But there is nothing in Section 17 requiring the application of the above-mentioned rule of construction to secure harmony between that section and Section 63a. It contains no ambiguous or doubtful words or phrases, nor do its provisions, when naturally and fairly read, clash in any particular with those of the other section. Each may have its appropriate and full operation without interfering with the other. While Section 17 limits the exception from the operation of a discharge to such of the demands or liabilities it mentions as are 'provable debts', Section 63a limits provability to the classes of demands or liabilities therein defined. Section 17, since the amendment, no more countenances the idea of the provability of a demand or liability, not provable under and by virtue of Section 63a, than it did before its amendment."

It has been difficult to select passages to quote from this decision, because practically every word of it is in point in the present case.

This decision of Judge Bradford was appealed from, and in *Brown & Adams v. United Button Company*, 149 Fed. 48 (1906), the Circuit Court of Appeals for the Third Circuit affirmed Judge Bradford's opinion, saying, at page 51:

"The argument is, that the right to prove must, in justice, be coextensive with the release to be obtained, and that, as it is plainly provided (Section 17) that the bankrupt shall be discharged from lia-

bility for all but certain excepted torts, it must be that all which are not so excepted are entitled to come in. As said by Mr. Justice Brown in *Crawford v. Burke*, *supra*:

"It certainly could not have been the intention of Congress to extend the operation of the discharge under Section 17 to debts that were not provable under Section 63a."

"The one section, according to this, is to be read in the light of the other, and that construction adopted which will consist with both.

"Care is to be taken, however, in this comparison, not to reverse the order of importance in which they are to be considered. Nor in case of conflict to press the argument too far. **If any section is controlling in this regard, it is the section which declares what debts are provable, and not the contrary.** It is not so much, in other words, that a tort of the character which we have here is discharged by the one, as that it is made provable by the other, that gives it a standing against the estate. Even if the one were true of it and not the other, the right to come in would not be established, it being possible that there is a lapse in the law in this respect, the result of imperfect adjustment, upon amendment; a conclusion to be avoided, if it can be, but not at the expense of that part of the statute which must necessarily govern."

In a special concurring opinion, Judge Gray, than whom no Circuit Judge has enjoyed greater authority, said:

"While concurring in the result reached by the majority of the Court, and to some extent in the rea-

soning employed in reaching that result, I am constrained to think that the *ratio decidendi* of the Court below is that upon which our decision should rest. Without attempting to amplify or paraphrase the opinion of the learned Judge of that Court (*In re United Button Co. (D. C.)* 140 *Fed.* 495), it is sufficient, in referring to Section 17, to again note that the debts which 'discharge in bankruptcy shall release', are **such debts only as are provable under Section 63**, and the debts which are excepted from discharge, being among other liabilities for certain torts, are also necessarily provable debts. If it be said that 'wilful and malicious injuries to the person or property of another' and 'seduction' or 'criminal conversation' are torts pure and simple, and as such incapable of liquidation and proof under Section 63, it may be replied that liabilities for such torts, when reduced to judgment, are provable, and come within the classification of 17a (2) as 'liabilities' for certain torts. Be this as it may, it is true, however, that even if, out of abundant caution, certain of the torts which are included in the excepting clause could not have been liquidated and proven under Section 63, still the fact that the excepting clause in this respect overlaps provable debts and includes some that are not provable, does not nullify the qualifying effect of the word 'provable', as limiting the debts to be excepted, as well as those which are discharged by Section 17, and, as said in the majority opinion of the Court, cannot serve to abrogate or qualify the description of provable debts as contained in Section 63.

"In this view the two sections, 63 and 17, are not necessarily irreconcilable."

In *In re New York Tunnel Company*, 159 Fed. 688, (1908), the Circuit Court of Appeals for the Second Circuit, Circuit Judges Lacombe, Ward and Noyes, considered this same question of the effect of the amendment of 1903 to Section 17 upon provable claims. The Court followed the opinion of the Circuit Court of Appeals for the Third Circuit, saying, at page 690:

"In 1903 Section 17 was amended in various ways. One change was the substitution of the word 'liabilities' in place of the word 'judgments.' And the provision as it now stands affords some basis for the claim that the exception from the operation of the discharge of particular liabilities for tort implies that such liabilities in general are not discharged. **But this implication does not carry far.** The amendment was to be an exception in the discharge statute which states what debts shall be discharged rather than what debts shall not be. A negative provision that liabilities for certain torts shall not be discharged does not, of itself, make all other tort liabilities provable debts. It is apparent that Congress, by the amendment, intended to preclude the possibility of claims for certain torts being discharged, whether reduced to judgment or not. Having that object in view, it used language not wholly in harmony with the other sections of the act. **But we see nothing to indicate an intention to enlarge the classes of provable debts.** Certainly no intention is evidenced to bring in claims for torts which were never provable under the earlier bankruptcy acts. We therefore follow the very careful opinion of the Circuit Court of Appeals for the 3rd Circuit in *Brown v. United Button Company*, 140

Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, in holding that a claim for unliquidated damages founded upon tort is not provable in bankruptcy. The claims of the petitioners were of this nature, unaccompanied with contractual liability, and the District Court was without power to make the orders complained of. They should be set aside."

In *In re Southern Steel Company*, 183 *Fed. 408* (1910), Judge Grubb, of the Northern District of Alabama, reached the same conclusion, citing with approval the decision in *In re United Button Company*, 140 *Fed. 195*, and saying at page 499:

"It is conceded that the liability to constitute a provable claim must be one arising out of an implied contract. Quasi contractual liabilities, such as torts, which admit of waiver and an election to sue as for a contract, are within the class. *Remington* (page 377) says:

"'However, in cases where the tort may be waived and suit be brought in contract, the claim may be proven in bankruptcy, but may not be so proved where the tort cannot be waived and suit brought in contract. Not every tort is of such a nature that it can be waived and suit brought on an implied contract. Only those torts that have resulted in the enrichment of the wrongdoer are such, for the measure of the enrichment is the measure of the implied contract', citing *In re United Button Company* (D. C.) 15 *Am. Bankr. Rep. 391*, 140 *Fed. 495*."

In *Reynolds v. New York Trust Co.*, 188 *Fed. 611* (1911), the Circuit Court of Appeals for the First Circuit, composed of Judges Colt, Aldrich and Brown, again reached the

same conclusion, in a case to which we will refer again hereafter, and which is on all fours with the present case in every particular.

In every one of these cases, five in all, the contentions now made by the claimants in this case as to the effect of the amendment of 1903 to Section 17, were elaborately considered, and in every one of them a decision squarely adverse to those contentions was reached. We thus have the unanimous opinions of two District Courts and three Circuit Courts of Appeal, or the opinions of eleven Federal Judges in all, directly opposed to the argument advanced by the claimants in this case. **There is not a single case to the contrary.**

It is urged by the claimants in their memorandum that the action of Congress in substituting the word "liabilities" for the word "judgments" by the amendment of 1903, indicates the intention of Congress to extend the classes of provable claims. The question at once arises: **If Congress so clearly intended to extend the classes of provable claims, why did it not do it in the simplest, most direct and unmistakable way, i. e., by amending the definition of provable claims contained in Section 63a.** But since Congress failed to do this, the presumption must be, rather, that it did not intend to enlarge the class of provable claims, than that it had intention to so enlarge it. And when we come to examine the history of the amendment of 1903 we find this presumption against such an intention emphasized by the explanations which were offered in Congress for the amendment.

The amendment of 1903 to Section 17 originated in the House Bill 13,679, which was introduced in the House of Representatives April 16, 1902 (see *Vol. 35, Congressional Record, page 4280*). The bill was referred to the Committee on the Judiciary, who on April 1, 1902, reported it back to the House with its approval. That report clearly states the reasons for the amendment to Section 17, and we quote from the report, which will be found in the Miscellaneous Documents of the Fifty-seventh Congress, first session, House Report No. 6, being report number 1698. Referring to the proposed amendment to Section 17, the report says:

"The next amendment provides that liabilities for frauds, etc., as described in the act shall not be released by the discharge. As the law now is these liabilities must have been reduced to judgment or else the bankrupt is discharged. This amendment is in the interest of justice and honest dealing and honest conduct. This amendment further provides that a discharge in bankruptcy shall not release the bankrupt for alimony due or to become due to his wife, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation. It seems to the committee, and this is the universal sentiment, that the bankrupt ought not to be discharged from liabilities of this description."

In the detailed analysis of the bill which accompanied the report the following further explanations are given:

"Section 6: The changes in Section 17 of the law are to settle questions arising from antagonistic decisions of the Court and to exclude beyond per-

adventure certain liabilities growing out of offenses against good morals from the effect of a discharge. (Compare a similar amendment to the English act of 1883 by Section 10 of the amendatory act of 1890).

"The substitution of 'liabilities' for 'judgments in actions' makes the clause broader. Now claims created by fraud but not reduced to judgment are discharged. Neither the claim nor the judgment should be. (Compare *In re Rhutassel (Iowa)*, 96 *Fed.* 597, with *In re Levenson (N. Y.)*, 99 *Fed.* 73)."

These comments indicate at once the object of Congress in substituting the word "liabilities" for the word "judgments." It was **not**, as suggested by claimants here, to correct a supposed injustice which arose from making claims in judgment provable in tort cases and eliminating from proof claims which had not been reduced to judgment. The change was made purely, as explained, because prior to the amendment the Courts had held that **provable** claims (i. e., claims based upon contract), where the bankrupt had been guilty of fraud, would be released by a discharge because not reduced to judgment. This had been decided in the District Courts in the cases referred to in the committee's report, and was afterwards decided, in cases arising prior to the amendment, by the Supreme Court in the decisions in *Crawford v. Burke*, 195 *U. S.* 176, and *Tindle v. Birkett*, 205 *U. S.* 183. The claims in those cases were provable because arising out of contract, but owing to the fact that Section 17, prior to the amendment, excepted from a discharge only **judgments** for obtaining property by false pre-

tenses, such claims were covered by a discharge notwithstanding the fraud of the bankrupts. The intention of Congress, therefore, was merely to remove the protection of a discharge from claims **otherwise provable**, and which would otherwise have been covered by a discharge, where the bankrupts had been guilty of false representations in the making of the contract. In making the amendment, Congress was simply bringing back the bankruptcy law of 1898 into conformity with the Act of 1867. Under the Act of 1867 (Section 33) claims contractual in character, and hence provable as either express or implied contracts, were nevertheless not barred where the bankrupt had been guilty of fraud. In the Act of 1898, as originally enacted, however, through the use of the word "judgment" in Section 17, such claims had been covered by a discharge wherever not reduced to judgment; and as the report of the Judiciary Committee and the cases cited by the committee show, it was in order to correct this, and only in order to correct this, that the amendment to Section 17 was made. It was not with any idea of enlarging the classes of provable claims.

An examination of the cases referred to by the committee throws additional light on the reason for the amendment. **The committee had no grievance with the earlier cases holding tort claims non-provable; it did not cite them or seek to change their rule.** The only cases cited by the committee as illustrating the reason for its proposed amendment were **contractual** cases of fraud where a discharge had been held binding although fraud had been practiced, because the claims had not been reduced to judgment.

It was the rule of those cases, and those cases alone, that the amendment was designed to change.

The propriety of Congressional action in this particular was the more marked, because it had been held under Sec. 17 before the amendment, that even where a judgment had been obtained in a case arising upon contract, where the bankrupts had been guilty of fraud, the discharge in bankruptcy would be a bar to further proceedings on the judgment, if the judgment itself did not upon its face show that it had been rendered in an action where false representations had been employed. This was the holding in *In re Rhutassel*, 96 Fed. 597, one of the cases cited by the Committee on Judiciary in its statement of reasons for the proposed amendment, and other decisions were to the same effect.

See *American Surety Co. of N. Y. v. Spice*, 119 Md. 1, a. c., 85 Atl. 1031, collecting the earlier cases to the same effect; see also, *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 111 Fed. 361.

Counsel say in their brief in this Court (p. 48) that we have been forced to take the position that in amending Section 17 Congress used the word "liabilities" inadvisedly. That is incorrect. We think Congress used the word advisedly but the report of the Congressional Committee shows that it used the word advisedly, **not** for the purpose of enlarging the class of provable claims but in order that fraudulent provable claims should not be discharged even though not reduced to judgment.

That the intention of Congress in amending Section 17 was merely to renew the rule under the Act of 1867 by

which claims originating in contract and thus provable would be excepted from a discharge, even though not reduced to judgment, if the contract had been procured by a fraudulent representation, has been recognized by all of the text writers.

See *Black on Bankruptcy*, Sec. 743; *Loveland on Bankruptcy*, Sec. 760, where it is said:

"As originally enacted, clause 2 of Section 17 provided 'that judgments in actions for fraud or obtaining property by false pretenses or fraudulent misrepresentations' are not released by a discharge. This provision was held to apply to judgments alone and not to affect simple **contract** debts not reduced to judgment. The judgment must have been obtained in an action for fraud or obtaining property by false pretenses or false representations. * * The words 'judgments on actions for fraud' were omitted in the amendment of February 5, 1903, and in proceedings begun since that time judgments in that class of cases are released by a discharge to the same extent as if the claim had not been reduced to a judgment."

In *Collier on Bankruptcy* (9th Ed.) page 390, it is said:

"Some important changes were made in this subdivision (17) by the amendment of 1903. The most vital is the substitution of the word 'liabilities' for the words 'judgments in actions' at the beginning of the subdivision. This is a substantial return to the phrasing used in the former law departed from, it is thought, by the framers of the present statute because of the uncertainty whether the word 'debt' there used included a judgment. This doubt now

being removed, the unwisdom of the change made by the original statute becomes apparent. * * * Before the amendment a bankrupt might have been released from debt **contracted** in fraud unless the fraud had been determined and a judgment therefor had been rendered. As the law now stands, the frauds which will bar a discharge are those connected with the obtaining of property by false pretenses or false representations."

From all of these sources, therefore, it is apparent that the real object of Congress in amending Section 17 was not to make tort claims provable, but to except from discharges contractual claims procured by false representations, even though they had not been reduced to judgment.

The argument of the claimants as to the supposed intent of Congress therefore fails entirely.

Every one of claimants' contentions is thus disproved by the testimony of the framers of the amendment of 1903 themselves and by every principle of statutory construction, as well as by the elaborate criticisms made in all of the decisions rendered since 1903 to which we have referred. At this stage of the discussion there is nothing left of claimants' position except their attempted argument from the language employed by the Supreme Court in *Friend v. Talcott*, 228 U. S. 27, and *Clarke v. Rogers*, 228 U. S. 534.

Neither of those cases, however, upon analysis, supports the present contention of the claimants.

In *Friend v. Talcott* the claim of the creditors arose out of contract. They had been induced to sell goods to the bankrupts by fraudulent representations, precisely as Mul-

ler, Schall & Company claim here to have been induced to buy drafts from the bankrupt firm by fraudulent representations. The creditors in *Friend v. Talcott* did not, however, attempt to do what Muller, Schall & Company are attempting to do here—make double proof and assert a claim in tort against the estates of the individual members of the firm in bankruptcy. Instead they took a composition in bankruptcy from the firm (**against whom they had a clearly provable claim upon contract**) and thereafter brought suits for damages against the firm because of the deceit practiced in procuring a sale of the goods on credit. The bankrupts set up the composition, which, under the act, has all the effect of a discharge. The Supreme Court very properly held that this was no bar to the suit, because the claims had been procured by fraud.

Prior to the amendment of 1903 the discharge would have been a bar under the decision in *Crawford v. Burke*, 195 U. S. 176, and the earlier cases, because the claim of the creditors, while **contractual** in nature and hence provable, had not been reduced to judgment. But the entire object of the amendment of 1903, as we have seen, was to eliminate the requirement that contractual claims based on fraud should be reduced to judgment in order to enjoy exemption from a discharge. Clearly there can be no quarrel with this decision; nor does it indicate that the creditors there could have done what Muller, Schall & Company are attempting to do here—make double proof and assert a claim in tort (in tort alone) against the individual estate of the individual partners in bankruptcy.

In the argument in *Friend v. Talcott*, however, counsel for the bankrupts contended that the claim of the creditors was barred because they had accepted the composition; it was claimed that the creditors had voluntarily come into the bankruptcy when they were not entitled to do so because their claims were not provable; and in support of the contention that their claims were not provable it was pointed out that the claims were not discharged. The argument used was that because a claim was not discharged, therefore it was not provable, and that by voluntarily coming into the bankruptcy proceedings with a non-provable claim, the creditors had estopped themselves from proceeding after the bankruptcy on the theory of the decision in *Chapman v. Forsythe*, 2 How. 292. But the Supreme Court properly pointed out that this was a complete *non sequitur*; because a claim is not discharged it does not follow that it is not provable. It was in that connection that the Supreme Court used the language which counsel for claimants here quote, pointing out that Section 17 expressly provides that a discharge should release a bankrupt from all his "**provable** debts except such as", etc. Section 17 does recognize that the exceptions which it establishes are exceptions from provable claims; but the mistake which counsel here make is in assuming that because the exceptions which Section 17 makes are exceptions from provable claims, therefore every case which is covered by an exception of Section 17 must be a provable claim. This is also clearly a *non sequitur*. Section 17 applies only to such claims as are provable. It does not define what claims are provable. It merely specifies that **such** of the claims that

are **provable** as involve false representations, etc., shall not be covered by a discharge; it does not undertake to say that every claim which involves false representations is provable; on the contrary it is only such **provable** claims as involve false representations that the section refers to and covers. This argument was emphasized by Judge Bradford, in his opinion in *In re United Button Company*, 140 Fed. 495, where he said, at page 501:

"Section 17 did not provide that there should be excepted from the operation of a discharge all taxes due from the bankrupt, 'levied by the United States, the State, county, district, or municipality in which he resides,' or all 'judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another,' or all demands 'created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in a fiduciary capacity.' On the contrary it provided that a discharge should release the bankrupt from all his provable debts, 'except such'—that is to say, such of the provable debts, demands or claims against him—'as (1) are due as a tax levied,' etc.; '(2) are judgments in actions for frauds,' etc.; 'or (4) were created by his fraud, embezzlement,' etc. Only in so far as they were provable were claims 'due as a tax levied by the United States,' etc., 'judgments in actions for frauds,' etc., and demands 'created by his fraud, embezzlement,' etc., excepted from the operation of the discharge. It is a fallacious idea that a demand against a bankrupt was provable because it fell within the general description of demands mentioned in Section 17, provable claims for

which were excepted from the operation of a discharge. If, indeed, none of the demands included in any given description of debts or liabilities mentioned in Section 17 were covered by the provisions of Section 63-a defining 'provable debts', when read in the light of other provisions of the act, it might be urged with some color that by implication Congress intended in and by Section 17 so to extend provability as to cover all demands included in such given description. But such an hypothesis is without foundation. When Section 63a is read, it will be found that its provisions defining the classes of debts or claims made provable are broad enough to cover demands of a provable nature in each of the several classifications mentioned in Section 17 prior to its amendment."

See also the opinions of Judges Archbald and Gray in 149 *Fed.* 48.

Read in this connection, there is nothing whatsoever in the language in *Friend v. Talcott* to support the argument now made by claimants.

The argument which the Supreme Court rejected was that **no** claim of fraud was provable. The argument of the claimants here is that **every** claim of fraud is provable. To reject the contention that **no** claim for fraud is provable, is not the same thing as saying that **every** claim for fraud is provable. The truth is in between: **some** claims for fraud are provable, i. e., those founded on contracts, express or implied, and thus within Section 63-a-4; and not any others.

Reliance is, however, sought to be placed upon the language in *Clarke v. Rogers*, 228 U. S. 534. That was a case

where a trustee had embezzled trust funds for his own use. Immediately prior to his bankruptcy he had preferred the particular trust fund from which he had embezzled, at the expense of other trust funds by taking from other trust funds securities to make good his defalcation in the first trust fund. When his trustee in bankruptcy sought to recover this preference it was argued that it was not a preference, technically, because the claim of the first trust fund against him for his embezzlement was not provable in bankruptcy (and only provable claims can be preferred). The Court overruled this contention, pointing out that the claims against the trustee might either be rested upon express contract upon his trustee's bond, or upon implied contract because of the unjust enrichment of his estate as well as the implied agreement of a trustee to faithfully carry out his trust. This finding was the basis of the decision, as an examination of the language of the Court will indicate. Any language which the Court employed unnecessary for this conclusion was purely *dictum*; and, indeed, as we shall show, it did not purport to be anything but *dictum*.

The language of the Court itself did not purport to do anything more than to express an intimation; and it is difficult to make out just what that intimation is directed to. The Court had cited in its opinion the case of *Crawford v. Burke*, 195 U. S. 176, and *Tindle v. Birkett*, 205 U. S. 183, 186, as authorities for the proposition that a claim was provable where founded upon an open account, or upon a contract, express or implied, using of these cases the following language:

"That **SOME** torts may be waived and be the basis of provable claims is decided in *Crawford v. Burke*, 195 U. S. 176, 187. Crawford and one Valentine were stockholders and dealers in investments. They had in their possession certain shares of stock which they held as pledge and security for the amount due them by Burke on the stock. They sold Burke's reversionary interest in the stock whereby it was wholly lost. He sued them in trover. They set up their discharge in bankruptcy. It was held, the Court speaking through Mr. Justice Brown, to be clear that the debt of Burke was embraced within the provisions of a paragraph 'a' as one '**founded upon an open account,**' or '**upon contract, express or implied**', and might have been proven had he chosen to waive the tort and take his place with other creditors of the estate. The discharge in bankruptcy was held on other provisions of the act to be a defense. The case was applied and followed in *Tindle v. Birkett*, 205 U. S. 183, in an action to recover damages claimed to have been sustained by false and fraudulent representations. It was decided that the claim was one provable under Section 63a as '**founded upon an open account or upon a contract, express or implied.**'" (Black letters ours).

It will be noted that the Court itself described these cases as deciding that the particular claims there involved were held provable as founded upon an open account or upon a contract, express or implied; and that the Court considered these decisions authority only for the proposition that **SOME** torts might be waived and made the basis of provable claims. Both of these cases, thus explained,

are therefore, inferentially, undoubtedly authority against the position sought to be taken by the claimants here, there being here no basis for the waiver of the tort because no enrichment of the individual estates.

After thus characterizing these decisions, the Court went on to say:

"It is, however, said that these cases are explained and limited in *Grant Shoe Co. v. Laird Co.*, 212 U. S. 445, to instances 'where there is a claim arising out of a contract, but of such a nature that there is at the same time an independent remedy in tort.'"

Coming to discuss this contention, the Court used the language at page 547, which claimants quote:

"In other words, the Court recognized that from the misuse of the funds the law would imply an obligation to repay. This ruling brings the case at bar within *Crawford v. Burke* and *Tindle v. Birkett*, even if their application be as limited as appellant contends. It may be questioned if they are so limited. They recognize the relation of Section 63a to Section 17. Section 17 excludes certain debts from discharge, among others, those created by the bankrupt's 'fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.' It was said in *Crawford v. Burke*, 'If no fraud could be made the basis of a provable debt, why were certain frauds excepted from the operation of the discharge?' The question was pertinent in view of the language of the section. It provides that 'a discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as,' etc. The relation of the section was

also recognized in *Friend v. Talcott*, ante, page 27. It is there declared that Section 17 enumerates the debts provable under Section 63a which are not discharged. Among them, we have seen, are those created by fraud, embezzlement, misappropriation or defalcation in any fiduciary capacity. It would seem, therefore, to follow that the conversion of trust funds creates a liability provable in bankruptcy."

We have no quarrel with this language properly construed. It says nothing more than that debts created by fraud in a fiduciary capacity, being cases in which a contract may be implied by law even if not implied in fact, are provable. There is nothing in the language indicating that the Court had any idea that a case of tort, pure and simple, in which no contract could be implied even in law, was provable.

The argument for appellant in *Clarke v. Rogers* was that you could not prove a claim that did not grow out of any relation of contract, even though there was an unjust enrichment, by resorting to the fiction of waiving the tort; that you could prove only a claim that arose out of contract as such— either an express contract or a true contract implied in fact—that you could not prove a claim for which the only contract basis was a contract implied in law. To this argument the Supreme Court said in effect:

"It may be questioned whether this argument is sound; but even if it is sound we have here a claim that does arise out of contract as such, because the liability of a trustee is contractual."

It will be borne in mind that the Court was discussing the contention that the decisions in *Crawford v. Burke* and *Tindle v. Birkett* were limited by *Grant Shoe Company v. Laird Company* to cases "arising out of contract where there was an independent remedy in tort." In *Grant Shoe Company v. Laird Company*, 212 U. S. 445, the claim was for breach of an express warranty of shoes, i. e., a claim upon a contract express in fact; and the argument was that that decision restricted provable claims to claims arising out of true contract—that is, either out of contract express in fact or out of contract implied in **fact**—and eliminated cases arising out of contracts implied in **law** only. All the Supreme Court did, in discussing this contention, was to suggest that there might be room for an argument on the question whether a claim must arise out of contract express or implied in fact instead of out of tort that might be waived and made the basis of a contract implied in law, i. e., the Court intimated (what has several times been held in the lower Federal Courts) that even where there was no contract express in fact or implied in fact, you could prove a claim upon the basis of a contract implied in **law** where the tort was one that could be waived. This was very far from suggesting room for even a question as to whether claims resting upon tort alone could be proved where no element of contract is involved, and where there is no possibility for the waiver of tort, and hence no room even for a contract implied in law. The Court did not intimate the possibility of doubt on this subject; and on the subject which it did discuss the Court certainly did nothing more than suggest the possibility for argument. It will be noted

that the Court itself used the expressions "it may be questioned" and "it would seem". This language itself directly intimates that the Court itself considered its remarks to be nothing more than *dicta*. To such language the authority properly applicable is that of the Supreme Court itself in the leading case of *Cohens v. Virginia*, 6 Wheat 264, where the Court said:

"It is a maxim not to be discredited that general expressions in every opinion ought to be taken in connection with the case in which these expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the Court is investigated with care and considered in its every extent. Other propositions which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Every word of this quotation is precisely applicable to the language the claimants seek to emphasize in *Clarke v. Rogers*. This passage from *Cohens v. Virginia* has been cited with approval in literally hundreds of cases. See notations in *Lawyers' Edition Digest of the Supreme Court Reports*.

A most recent application of this rule by this Court is in the case of *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268. In that case the Supreme Court was called upon to find the law of Kansas, and it was urged in argument that general language in an earlier case made against the con-

struction which the Court found to be correct, the Court said through Mr. Justice Day (p. 272) :

"True, in *Christy v. Scott*, 77 Kas. 257, there is general language which, if taken broadly, makes against this distinction. But according to a familiar rule (*Cohens v. Virginia*, 6 Wheat 264, 399, *Pacific Express Co. v. Foley*, 46 Kas. 457-464) this language should be regarded as restrained by the circumstances in which it was used."

The same rule is to be applied to the language in *Clarke v. Rogers*.

But if reliance is to be placed upon the general language of the Court, then the latest general language employed by this Court in its latest decisions is directly opposed to the position of the claimants here and directly in support of the trustees' contention.

See *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 569 (1915) where the Court, speaking through Mr. Justice McReynolds, said at page 556 :

"Within the intendment of the law provable debts include all liabilities of the bankrupt founded on **contract, express or implied**, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation. *Dunbar v. Dunbar*, 190 U. S. 340, 350; *Crawford v. Burkke*, 195 U. S. 176, 187; *Grant Shoe Co. v. Laird*, 212 U. S. 445, 448; *Zavelo v. Reeves*, 227 U. S. 625, 631."

And in *Central Trust Company v. Chicago Auditorium*, 240 U. S. 581, in deciding that a claim for anticipatory

breach of an executory contract could be proved in bankruptcy, the Court said (page 592) :

"The claim for damages by reason of such a breach is 'founded upon a contract, express or implied', within the meaning of Section 63a-4, and the damages may be liquidated under Section 63b. *Grant Shoe Co. v. Laird*, 212 U. S. 445-448."

If the contention of counsel for Muller, Schall & Company were correct and really represented the view of the Supreme Court, it would have been unnecessary for the Court to specify that the claim of the Central Trust Company was "'founded upon a contract, express or implied,' within the meaning of Section 63a-4." It would have been sufficient to say that the claim was an unliquidated claim, provable as such under Section 63b. But the statement of the Court that the claim fell within Section 63a-4, and could be liquidated under Section 63b, indicates very clearly its view that paragraph b of Section 63 was designed merely to establish a method by which claims falling under paragraph a of the section could be liquidated, and not to enlarge the class of provable claims.

This is the latest decision of this Court upon this subject, and if any language is to be taken as controlling, it is this.

See also *Kreitlein v. Ferger*, 238 U. S. 21, at page 27, where this Court cited *Crawford v. Burke* as deciding not that all tort claims were provable, but only for the proposition that such tort claims as might also be presented in quasi contract might be proven. If the Court had considered *Crawford v. Burke* to decide the broader proposition,

it would not have been necessary for it to limit its application.

See also *Zavelo v. Reeves*, 227 U. S. 625, where the Court manifestly considered that provable claims must be found within the limits of paragraph a of Section 63 and did not refer at all to paragraph b. If the claimants' present contentions were correct and if paragraph b added an independent class of provable claims reference would certainly have been made thereto.

In this connection, in discussing the meaning of the language employed *obiter* by the Court it is interesting to observe that claimants, according to their memorandum to the Referee, would not themselves have agreed with the comments by the Court in the case of *Clarke v. Rogers* upon the decisions in *Crawford v. Burke* and *Tindle v. Birkett*, even if those comments are interpreted as counsel would interpret them. Both *Crawford v. Burke* and *Tindle v. Birkett* were cases arising out of contract where fraudulent representations had been made; but both of them were cases which arose prior to the amendment of 1903 to Section 17. Both of the cases arose, therefore, at a time when Section 17 did not except from a discharge claims involving false representations which had not been reduced to judgment; i. e., both of the cases arose at a time when no claims involving fraud were excepted from the discharge unless they had been reduced to judgment. In neither of these cases had the claims of the creditors been reduced to judgment. Therefore counsel admit that in neither of those cases could it have been properly held that an ordinary tort claim, involving false representations, was

provable. At pages 3 and 4 of their brief before the Referee, counsel said::

"We would not and could not claim that claims in tort for fraud would have been provable before 1903, and we base our rights to prove such claims squarely upon the language of Section 17 as amended and the decisions of the United States Supreme Court in cases arising under it. * * * *Crawford v. Burke*, 195 U. S. 176, arose under the Act of 1898, **before its amendment**. Under the original statute of 1898 liabilities for obtaining property by false pretenses were not provable in bankruptcy under section 63 or Section 17, unless they had been reduced to judgment. * * * **We do not contend** that *Crawford v. Burke* is an authority that the claims filed by Muller, Schall & Company are provable because the provability of these claims as claims in tort must rest upon the provision of Section 17 **as amended**, which recognizes that liabilities for obtaining property by false representations are provable and not discharged, and the statute which the Court construed in that case (Sections 63 and 17) did not recognize the provability of liabilities for obtaining property by false representations."

It will be noted that counsel here admit that *Crawford v. Burke* must be limited to cases arising upon contract, and that at the time of the decision in *Crawford v. Burke* the Supreme Court could not possibly have decided or intended to decide that tort claims for obtaining property by false representations were provable (because at that time Section 17 had not been amended).

This admission must be contrasted with the language in *Clarke v. Rogers*, upon which the counsel for claimants now

rely. Counsel now contend that by that language in *Clarke v. Rogers* the Supreme Court meant to intimate that *Crawford v. Burke* should not be limited to cases arising out of express or implied contract but should cover **all** tort claims. Counsel themselves have admitted however as we have shown that there could be no possibility of a question at the time of the decision in *Crawford v. Burke* on this point, and that *Crawford v. Burke* **must be limited**, under the conditions existing at the time of its decision, to cases arising upon contract, express or implied. Counsel are thus put in the position of themselves denying the correctness of the language of the Supreme Court in *Clarke v. Rogers* (as interpreted by them) from which they now seek support, because counsel themselves say that at the time *Crawford v. Burke* was decided a claim of the character which they now make could not have been proven. Thus counsel would not themselves agree with the construction which they now claim the Supreme Court put upon *Crawford v. Burke* in the language which they quote from *Clarke v. Rogers*.

What could more eloquently indicate that counsel themselves incorrectly interpret the *dicta* in *Clarke v. Rogers*?

At page 25 of appellants' brief, counsel say:

"If claims for fraud generally were not provable, they would not have been discharged."

Nobody contends that no claims for fraud are provable. Claims for fraud falling within Section 63a-4, being based upon a contract, express or implied, are undoubtedly prov-

able; and the natural and designed effect of Section 17-a, as amended, is to exclude those claims from a discharge even though not reduced to judgment.

As the foregoing discussion has at times indicated, it has been rather difficult to confine the arguments of counsel for claimants to a consistent position. A number of the arguments advanced by them before the Referee, have since been abandoned entirely and no reference made to them. Originally, in argument, counsel stated that they did not contend that all torts were provable in bankruptcy, but only certain torts, i. e., only such torts as might be considered as falling within the language of subdivision 2 of Section 17-a. Apparently, now, however, they claim that all claims for tort are provable. This amounts to an attempt to give Section 17-a (2) an even more extensive indirect effect than first suggested. It amounts to saying that not merely are the sorts of torts which might be embraced within the language of Section 17-a (2), made thereby provable, but that all torts are indirectly thereby made provable.

Thus the arguments as to the proper interpretation of Section 17 appears to be conflicting:

(1) On the one hand, it is argued that as Section 17 excludes from discharge wilful and malicious "liabilities", the word "liabilities" must be construed to mean torts, and such wilful and malicious torts as would fall within the language of Section 17 must be provable; else (it is argued) why exempt them from a discharge?

(2) On the other hand, it is argued that as Section 17 excludes from discharge only wilful and malicious liabilities, all other liabilities not wilful or malicious must be discharged; and since they are discharged, they must be provable. This argument assumes that every claim exempt from discharge is provable, although claims for alimony, as heretofore shown, are neither provable nor exempt from discharge.

According to argument (1), only wilful and malicious torts are provable.

According to argument (2), non-wilful and non-malicious torts—in fact all torts—are provable.

Argument (2) seems to be that presently favored by counsel.

It is difficult to support the accomplishment of so extensive a result by indirection, in the teeth of, and upsetting, the careful and specific provisions of the particular Section 63-a.

In *Adams v. Wood*, 2 Cranch, 341, the Supreme Court of the United States said:

“To declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words and to give the statute almost the same construction as if one distinct member of the sentence was expunged from it.”

So, in order to declare that Section 17a extends the class of provable debts, your Honors would practically have to read out and make meaningless the definitions and limitations of provable debts contained in 63a. No Court will do this when every part of the statute may be given a reason-

able and harmonious construction. Certainly no Court will do this when so to do would involve a radical departure from the rules and doctrine under every system of bankruptcy heretofore prevailing in this country and in England. If Congress had intended to extend the class of provable claims, the simplest, most direct and most certain way would have been by amending Section 63a, and such an amendment would doubtless have been made in 1903, when Section 17 was amended, if Congress had intended to accomplish the result here contended for.

As said in *In re Hirschbaum*, 104 Fed. 69, at 70, quoted *supra*:

"Assuming petitioner's construction of sub-section 'b' it would embrace claims arising from any cause. There is no language in the section which can be held to include some and not all torts, yet the general policy of bankrupt acts has been not to include in probable debts claims for damages for personal wrongs. It is hardly possible if Congress had intended such a departure from the history of bankrupt legislation that it should not have expressed the intent unmistakably."

As we have pointed out in an earlier passage of this brief, Section 33 of the Act of 1867, (printed in the appendix hereto) relating to claims covered by discharges, corresponds substantially with Section 17 of the present act; and in *Strang v. Bradner*, 114 U. S., 555, the Supreme Court squarely held that claims for fraud, of precisely the character here presented, were not provable in bankruptcy, notwithstanding the fact that Section 33 of the

Act of 1867 excepted claims for fraud from discharge, precisely as Section 17 of the present act excepts them from the operation of a discharge. The same result was reached as hereinabove pointed out, by the District Court sitting in New York, in *In re Schuchardt*, *Federal Cases* No. 12,483, where a claim against the individual members of a partnership, based upon allegations of fraud precisely corresponding to those in the present case, was held not provable. These cases are direct authorities against the contention of claimants, and claimants now seek to avoid the effect of them by contending that the construction of the Act of 1867 should not be followed in construing the precisely corresponding provisions of the Act of 1898.

But counsel themselves in argument below admitted that the present act should be construed in the same way as the act of 1867; for counsel argued before the Referee (mistakenly) that their claims would have been provable under the Act of 1867; and they then contended that because (as they then mistakenly claimed) the claims would have been provable under the Act of 1867, they should be provable under the present act.

Counsel themselves were, therefore, of the original opinion that the present act should be construed as the act of 1867 was. That indeed would be the ordinary rule. No sufficient reason has been suggested to impute to Congress an intent to have a different rule of construction applied to the Act of 1898 from that which had been judicially applied to the similar provisions of the preceding act of 1867. See *Greenleaf v. Goodrich*, 101 U. S. 278:

"And it may be admitted that when in a later act Congress uses expressions that had a recognized usage in a former act relating to the same subject, they intended to use them in the same sense in which they were first used, that is with their recognized meaning."

See also *Michie Enc. of U. S. Sup. Ct. Rep., Vol. II, p. 137*:

"Where the same or like terms, the meaning of which in a prior statute had been ascertained by judicial interpretation are used in a subsequent statute, they are to be understood in the same sense unless the intention to use them in a different sense clearly appears. Such a construction becomes a part of the law as it is presumed that the Legislature passing the later law knew what the judicial construction was which had been given to the words of the prior enactment."

Citing many decisions of this Court.

A very recent direct statement of the same rule was made by this Court in a bankruptcy case very much in point in the present controversy. See *Farmers & Mechanics Bank v. Ridge Avenue Bank*, 240 U. S. 498, where his Honor, the Chief Justice, said at page 505:

"* * * We are of opinion that it is to be conceded that if under the prior acts it was settled authoritatively and conclusively that the exception relied upon obtained and was fully recognized in practice, it would follow that the enactment of the same general rule without anything indicating a departure from the exception would justify the conclu-

sion that it was the legislative intent to continue the exception * * *."

Counsel attempt again to avoid the application of the decisions under the Act of 1867, notwithstanding the similar provisions of that act, by suggesting that the present act is less of a traders' statute than the Act of 1867, and in attempted support of that suggestion, reference is made to the fact that under the present act, it has been held that claims for breach of **promise of marriage and judgments** for all kinds of torts are provable. But counsel does not cite any authority to indicate that these claims, resting, in the first instance, upon contract, and in the second instance, upon judgments, would not have been equally provable under the Act of 1867; and reference to the provisions of that act governing proof of claims (Sec. 19, R. S. 5067, printed in the appendix hereto) will indicate that all of these claims would have been equally provable under the Act of 1867. There is no support in fact, therefore, for the proposition that the present Bankruptcy Act was intended by Congress to be any wider in scope on the question of provability of claims than the Act of 1867 or that the present act was intended to have less of the characteristics of a traders' statute than the earlier act. Nor is there any support for the contention that Congress intended the present Bankruptcy Act to be broader in scope than the contemporaneous English Act.

Counsel also suggest that all the courts which have unanimously decided that tort claims are not provable under the present act have erred in assuming that the amendment of 1903 to Section 17, was made in order to conform to the

rule which had prevailed under the Act of 1867. Counsel overlook the fact that this is the view of not only all the Federal Courts which have passed upon the question, but also of the unanimous text writers, including Collier (see quotations above). Counsel also entirely overlook the reasons assigned for the amendment by the Congressional Committee which demonstrate incontrovertibly that it was in fact the intent of Congress to revert to the rule established by the Act of 1867 which the Courts had held inapplicable under the original phrasing of the Act of 1898 because of the use of the word "judgment" in the original act, instead of the broader word "fraud" in the Act of 1867. Compare *Harrington & Goodman v. Herman*, 172 Mo. 344, 60 L. R. A. 885. In fact, the word "liabilities" substituted by the 1903 amendment for the word "judgment" is itself if anything less broad (as to the possible inclusion of tort claims) than the word "fraud" which is found in the act of 1867. If the word "fraud" in Section 33 (R. S. 5117) of the Act of 1867 did not make provable claims for fraud which sounded only in tort (*Strang v. Bradner*, *supra*) then certainly the word "liabilities" as used in Section 17 of the Act of 1898 does not make such claims provable.

The theory of every text writer on bankruptcy other than Collier is opposed to the contentions of petitioners here, and even Collier expresses a doubt as to the validity of his suggestions, saying at page 853 (foot-note), after suggesting the view contended for by counsel here:

"On the other hand, it is of course true that much inconvenience would result from the doctrine

stated in the text. Consult Section 17. **See also the limitation of the English statute for unliquidated damages by reason of a contract, promise, or breach of trust.**"

See also *Collier*, 11th Edition (1917), p. 976, quoted *supra*.

Remington, Loveland and Black, in their late editions, all issued since the amendment of 1903 to Section 17 are unanimous to the effect that tort claims are not provable.

See *Remington on Bankruptcy* (3rd. Ed.) 1915, Sec. 635:

"Claims *ex delicto* for money cannot be proved as such. Thus an unliquidated claim for damages for personal injury is not a provable claim. Nor is a claim for damages for mere destruction of property a provable debt. * * * The bankruptcy Act, Section 17 (a) (2) excepting from the operation of a discharge 'liabilities for obtaining property by false pretenses, or false representations, or wilful and malicious injuries to the person or property of another,' does not enlarge the class of provable debts so as to admit to proof injuries to the person not yet reduced to judgment. * * * However, in cases where the tort may be waived and suit brought in contract, a claim may be proved in bankruptcy; it may not be so proved where the tort cannot be waived and suit be brought in contract."

Loveland on Bankruptcy (4th Ed., 1912), p. 668:

"A claim for unliquidated damages to the person or property, sounding in tort and not based upon contract, is not provable in bankruptcy. Such are damages for assault, slander, deceit, personal injury, and the like * * * A claim for damages in tort is

not a debt in the sense that word is used in bankruptcy. No provision is made for proving or allowing a claim in tort either before or after liquidation. If Congress had intended to include such claims, it would have been easy to have used words to express that intention."

Black on Bankruptcy (1914), Sec. 514.

"Under the terms of the present Bankruptcy Act a claim for damages for a tort, not connected with any contractual liability, and not reduced to judgment before the filing of the petition in bankruptcy, is not a provable debt. Such a claim is not made provable by that clause of the act which provides that 'unliquidated claims' may be liquidated in such manner as the Court shall direct and may thereafter be proved and allowed; for this relates only to a matter of procedure, and does not enlarge the class of claims provable under the preceding paragraph, and contemplates only the liquidation of claims founded on contracts or open accounts. Nor are the debts which may be proved in bankruptcy enlarged by the fact that it is assumed in the seventeenth section of the act (regulating the effect of a discharge) that liabilities for torts are provable and therefore released by a discharge, certain specified torts being thereupon excepted from the effect of a discharge. For this section, as originally enacted, referred to judgments already recovered in actions for torts of the specified kinds, and was therefore not inconsistent with the sixty-third section of the statute, relating to provable debts. And the present want of harmony between the two sections is the result of the amendment of 1903, and therefore, in case of conflict, the sixty-third section, being specifi-

cally devoted to the enumeration and description of the classes of provable debts, must control.

"In accordance with these rules, a claim for unliquidated damages for negligence resulting in personal injuries is not a provable debt, nor a cause of action for negligence causing the death of a human being, or for negligence or nuisance resulting in injury to goods, or for trespass to land, or for deceit, or for assault and battery and false imprisonment. But in all these cases where the tort could be waived and recovery had as upon a *quasi contract*, the claim may be provable, if the amount is definitely fixed, or after being liquidated as the Court may direct. On this principle, a claim for the conversion of personal property is a provable debt."

Bradenburg on Bankruptcy (1917 Ed.), Section 570, after quoting Section 63-b, says:

"This subdivision does not add to the debts provable under subdivision a, but merely provides for the liquidation of such as are unliquidated, and hence does not authorize the liquidation of claims arising *ex delicto*, unless they are of such a nature that the claimant may waive the tort and recover in *quasi contract*."

See also 7 *Corpus Juris* (1917), 400, *et seq.*

Counsel attempt to find support for their labored construction by suggestions of supposed hardship resulting from the exclusion of tort claims from proof in bankruptcy. There are many answers to this suggestion. In the first place, circumstances of hardship are for the Legislature,

not the Courts. Tort claims have never been provable under any of the Bankruptcy Acts in force in this country; nor are they provable under the English Act. There has, in fact, been no hardship resulting. That is eloquently indicated by the fact that there has been no popular clamor for a plain amendment of the Bankruptcy Act so as to make torts clearly provable. If Congress had intended to change the whole current of bankruptcy legislation, it would have done so directly and unmistakably, not by *innuendo* or indirection.

As suggested by counsel for claimants themselves, the machinery of the Bankruptcy Court is not well adapted to the trial of damage suits, and it was never intended that it should be employed for that purpose. There is no hardship in the result. Tort claims, if not provable, survive the discharge. If they were provable, they would not survive in the ordinary case; and probably at least as much hardship would result to persons holding tort claims if the tortfeasor could relieve himself of further liability by going through bankruptcy.

Moreover, if the argument of hardship were controlling, why should not contingent claims be provable? Real hardship results from the exclusion of these claims, at least as often as from the exclusion of tort claims.

The suggestion at page 30 of appellants' brief that an insolvent debtor might, by collusion, permit a judgment in tort to be obtained against him, is certainly no argument for making tort claims generally provable. At best, it would

be an argument for denying the right of proof to tort claims collusively reduced to judgment (as it probably would be denied.)

Equally without merit is the suggestion at page 43 of petitioners' brief that if tort claims are not provable, an insolvent debtor may transfer all of his property to his tort creditors and then file a petition in bankruptcy, leaving nothing for his contract creditors. This result is supposed to follow from the fact that if tort claims are not provable, they cannot be made the subject of preferences. The first answer which suggests itself practically to this suggestion is that the iniquitous practice thus conjured up has never in fact been attempted notwithstanding the fact that for more than twenty years of the life of the present Bankruptcy Act, tort claims have been unanimously held not provable. The point cannot therefore be of much practical weight. But the conclusive answer to the point is that it overlooks entirely the rights of creditors under Sections 69-e and 70-e of the Bankruptcy Act. Mr. Collier, at page 897, 11th Edition, points out that while a transfer to anyone other than a creditor holding a provable claim cannot be avoided as a preference under Section 60-b, it can be reached by the remedies indicated in Sections 67-e and 70-e. Section 67-e makes null and void all transfers by a bankrupt within four months of the bankruptcy petition, with the intent to hinder, delay or defraud his creditors, except as to purchasers in good faith and for a present fair consideration. Under this provision certainly, any transfer by a bankrupt, on the eve of bankruptcy, to his tort creditors, under the circumstances supposed by counsel, could

be set aside. See *Dean v. Davis*, 242 U. S. 438 (1917). Section 70-e accords similarly effective protection.

To sum up this branch of the case, we submit that the foregoing considerations demonstrate:

First: That claims in tort of the character here presented were not provable under the Bankruptcy Act of 1800, nor under the Act of 1841, nor under the Act of 1867; and that they are not provable under the English acts.

Second: That it has never been the intent or policy of bankruptcy laws to admit to proof claims sounding in tort not reduced to judgment, the theory and policy of the bankruptcy law being, as pointed out by Judge Choate, in *In re Lachmeyer*, Fed. Cas. No. 7966, *supra*, for the relief of business men from business claims. Bankruptcy is supposedly concerned only with commercial matters, and was early confined to traders.

See *Loveland on Bankruptcy*, Sec. 3, and *Brown & Adams v. United Button Co.*, 149 Fed. 48.

Third: That tort claims are not provable under the Bankruptcy Act of 1898, and paragraph b of Section 63 does not add to the definition of provable claims established in paragraph a of that section.

Central Trust Co. v. Chicago Auditorium, 240 U. S., 581, 592.

To hold that paragraph b of Section 63 enlarged the class of provable claims would make meaningless the care-

ful enumeration in paragraph a. Compare paragraph b with the last paragraph of Section 19 of the Act of 1867.

To hold that paragraph b of Section 63 adds to the definition of provable claims is inconsistent with the repeated decisions that contingent claims are not provable.

Fourth: That the amendment of 1903 to Section 17 was not intended by Congress to and did not enlarge the classes of provable claims as set out in Section 63a. See report of House Judiciary Committee above quoted. The only purpose of Congress in amending Section 17 was to except from a discharge claims arising out of express or implied contracts procured by fraudulent representations, where no judgment had been procured; and this was the only purpose in substituting the word "liabilities" for the word "judgments." The decisions of three Circuit Courts of Appeal and two District Courts, or eleven Federal Judges in all, are unanimous and decisive against the claimants' contention.

Fifth: That the natural and reasonable construction of Section 17 makes it entirely consistent with Section 63-a, by making Section 17 apply only to such cases enumerated by it as are provable under Section 63-a. On the other hand, the construction of Section 17 for which claimants contend, is a construction by indirection, forced and exaggerated, which the Court would have to go out of its way to adopt in order to do violence to the careful and plain provisions of Section 63-a. It is the duty of the Court to strain to avoid such a result, instead of to strain to accomplish it.

To hold that all claims excepted from a discharge by Section 17 are provable would require a reversal of the decisions of this Court in *Audubon v. Shufeldt*, 181 U. S. 575; *Wetmore v. Markoe*, 196 U. S. 63, both holding that judgments for alimony are not provable (although alimony is specifically excepted from a discharge by Section 17.)

Sixth: That even if the construction of Section 17, for which counsel for claimants contend, were not forced, exaggerated and indirect, and even if there were an inconsistency with Section 63, the provisions of Section 63 must prevail, both because later in the statute and because devoted specifically to the subject of defining provable claims.

Seventh: That if Congress had intended to change the whole current of bankruptcy legislation or to adopt a different rule from that which was judicially applied to the similar provisions of the Act of 1867, it would have done so directly and unmistakably, not by *innuendo* or indirection.

VI.

THE TRANSACTIONS OUT OF WHICH THE CLAIMS OF MULLER, SCHALL & CO. AROSE WERE ENTIRELY PARTNERSHIP TRANSACTIONS AND THE CLAIMS ARE PROVABLE AGAINST THE PARTNERSHIP ESTATE ALONE; DOUBLE PROOF AGAINST THE INDIVIDUAL ESTATES IS NOT ADMISSIBLE.

As noted at the beginning of this brief, the claims of Muller, Schall & Company are based entirely upon drafts

drawn by the partnership which Muller, Schall & Company purchased from the partnership agent in New York in the regular course of the partnership business, the proceeds going entirely to the partnership. None of the drafts bore the individual signature or indorsement of either of the members of the firm. One of those members was in Paris and the other was in New Orleans at the time Muller, Schall & Company purchased the drafts in New York from the partnership agent.

Neither LeMore nor Carriere had any special individual connection with the Muller, Schall transactions which were handled entirely through Trippe, the partnership agent, and neither LeMore nor Carriere made individually any special representation as individuals to Muller, Schall & Company apart from the representations made through the partnership agents and employees in the regular course of the partnership business.

It is the settled policy of the bankruptcy law that partnership assets are for partnership creditors, and individual assets are for individual creditors. Section 5f of the Bankruptcy Act consecrates this principle:

"f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts,

such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"g. The Court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

The Courts have uniformly recognized the policy of the Bankruptcy Act by inquiring into the nature of the transaction upon which the claim is made, so that even where an obligation is signed with individual names, if it is shown to have arisen out of a partnership transaction, the claim based thereon is properly provable against the partnership.

See *Adams v. Deckers Valley Lbr. Co.*, 202 Fed. 48; *In re Matter C. H. Kendrick & Co.* (226 Fed. 980), 25 Am. B. R. 628; *Remington on Bankruptcy* (3rd Ed.), 2121.

That the real nature of the transaction will be looked into to determine whether the debt is one provable against the firm or against the individual partners was also held in *In re Stevens*, 104 Fed. 323, *Davis v. Turner*, 120 Fed. 605, and *Hibberd v. McGill*, 129 Fed. 590. These authorities illustrate the care with which the Courts have sought to accomplish the purposes of the bankruptcy act by applying partnership assets peculiarly to partnership debts and individual assets to individual debts. It is the substantial character of the transaction that controls and the Courts will look below the surface to ascertain that character. In

this case there is no question of the character of the transaction throughout; everything that was done with regard to it from the beginning to the end was partnership.

So far as we have been able to find, the only cases (with the one exception hereinafter noted) in which a partnership creditor has been permitted to prove also against the individual estate, are cases in which the partnership obligation held by the creditor bore also the individual signature or indorsement of an individual member of the firm. In such cases it has been argued that the creditor who extended his credit on the faith of the individual assets and resources of the individual member of the firm, whose separate indorsement he required, ought not to be deprived of the advantage which his diligence has won for him. Compare:

Buckingham v. First National Bank, 131 Fed. 192.

In the present case this principle is not applicable. Muller, Schall & Company did not extend any credit to the firm on the faith of the individual resources of either of the individual partners. They did not require the individual indorsement or guaranty of any member of the firm. To deny them recourse against the individual estates would not, therefore, be to deny them the reward of their diligence and foresight. But, on the contrary, to permit them to make double proof against the individual estates as well as the partnership estate, will be to enrich them at the expense of the creditors of the individual estates and of the other partnership creditors (in precisely the same position as themselves) who are entitled to the surplus of the in-

dividual estates, and to deviate from the fundamental principle of the Bankruptcy Act covering the distribution of partnership and individual assets.

Claimants argue in reply that, technically, they have several claims against the individual members of the partnership, and therefore technically they are entitled to make proof against the individual estates.

But technically the claimants here would have, under the law of Louisiana, a several claim in contract against the individual members of the firm arising from the partnership drafts, since under the Louisiana law each partner may be sued separately upon a partnership obligation. The Bankruptcy Act, however, intervenes and proclaims that no individual estate shall be held in bankruptcy upon any obligation which is in its essence a partnership obligation. See *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, where Mr. Chief Justice White pointed out the difference between the law of Louisiana and the provisions of the Bankruptcy Act. If this be true in contract, it should be equally true in tort; and if the bankruptcy law superseded the general law so that claims which could be asserted severally in contract against an individual partner cannot be asserted against his individual estate in bankruptcy, unless arising out of an individual transaction, so the Bankruptcy Act should supersede the general law so as to prevent a claim which could otherwise be asserted against an individual partner severally in tort from being urged against his individual bankrupt estate where it arises out of a partnership transaction. Otherwise we are making a distinction without a difference, and we are permitting par-

ties who in reality claim upon partnership transactions alone to have recourse to individual assets in competition with individual creditors.

This reasoning led the Circuit Court of Appeals for the First Circuit to deny the claim of creditors to prove against the estate of an individual partner in a case on all fours with the present case.

See *Reynolds v. New York Trust Co.*, 188 Fed. 611, where the Court held:

"The rule which permits the owner of property converted to waive the tort and to recover the value of the property as on an implied contract, is based on the ground that defendant's estate has been unjustly enriched by the conversion, and where it was by a partnership, and inured to the benefit of the firm estate, whatever implied contract arises is that of the firm, and not of an individual partner, and the owner of the property, after having proved his claim against the partnership estate as one of contract is not entitled to prove it against the individual estate of a partner, which would have the effect of giving him an advantage over creditors having express contracts with the firm."

The Court said at page 619:

"The Bankruptcy Act requires a distinction between firm and individual debts. The test of whether the debt is firm or individual is the character of the transaction from which it arises. Here there was no transaction other than a firm transaction; and a fiction of law which raises a promise based solely upon tort liability and not upon an obligation to pay for value received by an individual, cannot be al-

lowed without an infringement of the rights of the individual creditors, and of bankruptcy rules of equality."

In that case, as in this case, the basis of the claim against the individual estate was alleged fraud, through which the creditors had suffered loss. The case is indistinguishable in any aspect from the situation here presented. This brief has already reached such length that we do not undertake to quote *in extenso* from the opinion, but everything that the Court said therein as to the provability of a claim in tort, or as to election of remedies, or as to double proof, is directly applicable here. It will be noted that that case also arose after the amendment of 1903 to Section 17. It is, therefore, direct authority against the argument of Muller, Schall & Company here as to the provability of a claim in tort not reduced to judgment. But entirely apart from the question as to the provability of claims in tort since 1903, the case is decisive authority against the contention of Muller Schall & Company as to double proof in cases arising purely out of partnership transactions.

This decision was made the subject of a note in 39 *L. R. A. (N. S.)*, at page 391, which reviews the authorities, and remarks in conclusion:

"In conclusion it may be said that while the American cases cannot be said to deny the right to make double proof of a mere joint and several obligation, they have not allowed recourse to both estates except where the double claim was based upon the joint obligation of the firm, and also an independent obligation or undertaking of the individual part-

ner. This is true not only where the obligations were strictly contractual, but also where claim was made for wrongful misappropriation; for it will be noted that in the decisions involving misappropriation (with the exception of the *Reynolds case*), the partner as trustee, executor, etc., stood individually in a fiduciary relation with the claimant."

In the present case there was no fiduciary relation on the part of either of the members of the firm with Muller, Schall & Company, whose transactions were entirely with and through the agent of the partnership in New York.

The doctrine of *Reynolds v. New York Trust Company* is approved by the text writer upon whom counsel for Muller, Schall & Company particularly rely. See *Collier on Bankruptcy* (10th Ed., 1917), p. 197, where after commenting on cases where a creditor holding an individual indorsement has been allowed to prove against the individual estate, the author says:

"This principle may not be carried to the extent of permitting double proof against the state of the partnership and partners where the partnership in the course of firm business, converted securities belonging to a claimant who waived the tort and proved the claim, based upon an implied contract, against the partnership estate. Such a contract is an obligation of the firm, and not of the individual members."

And at page 187, in commenting on the general language of Section 5 of the bankruptcy law, Mr. Collier says:

"The evident purpose of the subsection is not only to prevent preferences in the technical meaning of

that word, but also to insure an equitable distribution of the assets among both firm and individual creditors."

And at page 195 he says:

"The question is in each case: Was credit given to the partner or to the partnership?"

In this case certainly no credit was given to the individual partners; it was extended to the partnership alone.

In this case equitable distribution between partnership and individual creditors will certainly not be accomplished by sanctioning the attempted double proof.

It is interesting to note that *Clarke v. Rogers* was decided in the Court of Appeals by the same Court which decided *Reynolds v. New York Trust Company*. See *Clarke v. Rogers*, 183 Fed. 518. If a confirmation were needed after an analysis of the case, this would further establish the fact that the decision in the *Rogers' case* rests entirely upon the provability of the claim therein involved as one arising upon contract (not merely implied or quasi contract, but express contract).

Claimants argued below that bankruptcy should not destroy the right which Muller, Schall & Company would have had independently of bankruptcy to pursue the individual partners upon the several claims for tort. But if bankruptcy destroys the right of partnership creditors under the general Louisiana law to pursue their several claims

in contract against the individual partners, (as held by Mr. Chief Justice White in *Miller v. New Orleans Acid & Fertilizer Company*, 211 U. S. 496, 503) does not the bankruptcy act destroy the right of the present claimants to pursue their several claims in tort against the individual partners? The truth is that the bankruptcy act does destroy the right in both cases in order to consecrate the principle of partnership assets for partnership creditors and individual assets for individual creditors, which is a principle of justice and equity.

None of the cases cited by claimants in support of the attempt at double proof is in point upon the facts, with the possible exception of the case of *In re Coe*, 169 Federal, 1002, 183 Federal, 745, and in that case, the point that the claims against the individuals sounded in tort and were not provable for that reason, does not appear to have been argued or emphasized. The same Court which decided this case, has since held that only such claims are provable as fall within Section 63-a, and that claims on tort are not provable.

See *In re Mullings Clothing Co.*, 238 Fed. 58, 67, (November, 1916), quoted *supra*, p. 27.

In *Reynolds v. New York Trust Company*, the decision in *In re Coe* was called to the attention of the Court and elaborately argued and considered, and the Circuit Court of Appeals for the First Circuit said:

"With the greatest respect for the opinions of the learned Judges in both the District Court and the

Circuit Court of Appeals, we are unable to accept the proposition that joint tort-feasors are jointly and severally liable, if by that is meant subject to both joint and several judgments. As we have said, a plaintiff is not entitled to two judgments against a tort-feasor, but is put to his election. He is permitted to deal with each of the tort-feasors as if he were the sole cause of the tort; but he may not subject a single defendant to two judgments, joint and several.

"Had this creditor proceeded to reduce its tort claim to judgment before bankruptcy, and to prove on the judgment in tort under Section 63a (1) he could have had but one judgment against E. H. Gay; at the creditor's election an individual judgment, or a judgment against E. H. Gay with others. In other words, he would have been compelled to elect between a joint and a several liability.

"It is true that upon the joint judgment in tort he might have had execution against the individual estate, but that is equally true of a joint judgment on contract.

"The bankruptcy statute intervenes to destroy the ordinary rights under execution by Section 5g, which divides the assets into partnership estate and individual estate, and gives priority of rights in the assets to creditors according to whether the debts are partnership or individual."

In England and the Common Law States of this country, the liability of partners in contract is joint alone. In Louisiana, as to commercial partnerships, it is joint and several. In both England and the Common Law States of

this country, it has always been the law that, upon the bankruptcy of a partnership, claims of partnership creditors could be proved against the firm estate alone and not against the individual estates. This result would appear to be correct both upon natural principles of justice and equity and as a logical consequence of the fact that liability of the partners is joint. In England, double proof against the individual estates was originally denied, even where the creditor of the partnership held also a separate, distinct and additional obligation of the individual. But, prior to 1869, that rule was modified in England by statute, and is now so modified. See Act of 1883, Schedule II, Rule 18 (corresponding to Section 37 of the Act of 1869, 32 and 32 Vict. c. 71), which reads:

"If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of **distinct contracts** as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstances that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts."

A similar provision is to be found in Section 21 of the American Bankruptcy Act of 1867 (R. S. 5074).

The decisions cited by petitioners, admitting double proof, are, all of them, cases where the claimant had a

separate and distinct contract from the individual. All of these cases, therefore, fell within the express provisions of the English statute and of the corresponding proviso in the Act of 1867. Most of those cases arose under the Act of 1867 and were, therefore, controlled by the special provision made therein, as in the English statute.

See *In re Bigelow*, 2 N. B. R. 371, 3 Ben. 146, *Federal Cases* 1397; *In re Howard*, *Federal Cases* No. 6750; *Emery v. Canal National Bank*, 3 Cliff. 507, *Federal Cases* No. 4446; *In re Baxter*, 18 N. B. R. 62, *Federal Cases* No. 1119; *In re Jordan*, 2 Fed. Rep. 319.

All of these cases arose under the express provisions of the Act of 1867. See *Story on Partnerships*, Sec. 387, Note 1; and all of them, as noted, were cases falling within the clear provision of that act and of the English statute, where the creditor held a separate and distinct contract of the individual partner.

In *In re Baxter*, 18 *National Bankruptcy Register*, 62, *Federal Cases* No. 1119, the decision was based upon the authority of *Emery v. Canal National Bank*, *Federal Cases* No. 4446; and that case was one where the claimant had expressly bargained for and procured the separate individual indorsement of an individual member of the firm upon the firm obligation. In *In re Tesson*, 9 *National Bankruptcy Register*, 378, *Federal Cases*, No. 13,844, the Court based its decision upon the fact that

"as the whole separate estate of Edward P. (the individual partner) was merged in and constituted the entire estate of the co-partnership, and as no

question as to adjustment between the two estates for dividends paid by each can arise, the doubt, if any, should be solved in favor of the creditor."

In *In re Jordan*, 2 Federal 319, the moneys of the claimant had been converted in the first place by the individual, and there was, therefore, sufficient basis for the implication of a quasi contract or claim in *assumpsit* against him. When he afterwards turned over the moneys to his partnership, the firm also became responsible, without relieving him; for it is immaterial what a tort-feasor, who has unjustly enriched himself, thereafter does with the proceeds of his wrongdoing. In the present case, however, neither of the individual partners ever, in the first instance, or at any other time, received individually any of the claimants' money. Moreover, these cases, as well as that of *re Parkers*, 19 Q. B. D., 84, cited at page 49 of claimants' brief, were all cases of breaches of trust by an individual partner who was himself under a special trust obligation quite apart from his participation in any firm tort. All of them, therefore, fall within the distinction taken in the note to 39 L. R. A. (N. S.) at page 391, as cases where there was an independent obligation or undertaking of the individual partner—such as there was not in the present case.

Neither in England nor in this country, at any time, has double proof been admitted where the creditor held no separate or distinct contract or obligation of the individual. In *Ex Parte Adamson*; *In re Collie*, L. R. 8 Ch. Div. 87, on which petitioners particularly rely, the proof by Adamson against the individual estates was permitted only upon

withdrawal of his claim against the joint estates the majority of the Court saying, at page 820:

"And according to this rule Mr. Adamson was not entitled to go against the joint estate and the separate estates, but had to make his election. It is not too late for him now to elect, and it must therefore be declared that he is entitled to proof against the separate estates of Alexander and William Collie in respect to the bills which he was induced to accept by their fraud; but he must withdraw his proof from the joint estate and refund the dividend accordingly. * * *"

This case then, even if it were conceded to be an authority in favor of petitioners on the question of provability of their claims against the individual estates, is a direct authority against petitioners on their attempt to make double and triple proof. Here the petitioners have not only made proof against the partnership estate, but have actually received, without reservation, dividends of 3% on their claim against the partnership estate, upon the same basis as other creditors (Record, p. 22).

Apparently, petitioners would like to apply the rule of *Ex Parte Adamson* insofar as they think it assists their present contentions and to reject it insofar as it is opposed to them.

Assuming that *Ex Parte Adamson* stated the English law on provability of claims against the individual estates, petitioners would accept it as controlling on that point; but petitioners would reject it insofar as it denies the right to double and triple proof.

Petitioners, therefore, are contending for a doctrine in this case made up partly of an adoption of a supposed English rule on provability of claims (we say supposed because the later cases cited show that the rule of *Ex Parte Adamson* is not applicable here) and partly of a rejection of an admitted English rule against double and triple proof. Petitioners would manufacture a special hybrid rule representing neither the whole American law nor the whole English law, but a part of the law of each, in order to attain the practical result which they desire to reach.

In *In re J. & H. Davison; Ex Parte Chandler*, 1B Q. B. D. 50, also relied upon by petitioners, it was also made a condition of proof against the separate estate that the claim against the partnership estate should be withdrawn.

It will be noted that at the time of the decision of *Ex Parte Adamson*, the English law expressly permitted the making of double proof where a creditor held the additional, separate and distinct individual obligation of the partner. (See Bankruptcy Act of 1869, Section 37.) The English law at the time of the decision of *Ex Parte Adamson* therefore permitted the making of double proof as fully as the American decisions have ever permitted it. The Court, however, did not consider the case as falling either within the letter or the spirit of the statutory provision and denied the right to double proof. The case is, therefore, a direct authority that claims based upon a partnership tort are not considered as involving separate and distinct obligations of the individual partner so as to permit separate and double proof against the individual estate. The present case does not, therefore, fall within any

of the authorities cited by petitioner, all of which have rested upon the presence of such separate, distinct and additional individual undertakings.

Thus, neither in England nor in this country has the mere fact that partners could, because of special circumstances, be held jointly and severally liable for a firm transaction, ever been held to justify double proof. In both England and in this country, one having a claim against a partnership, and a separate, distinct and additional undertaking from an individual partner, may make double proof; but in neither country will the liability of a partner growing out of a partnership transaction only support such proof.

Judge Story's criticism of the English rule against double proof, to which petitioners particularly refer, is directed, as will be found upon an examination thereof, against that portion of the English rule which denied the right to separate proof, even where the creditor held a separate, additional, distinct and individual obligation of the partner, as, e. g., the partner's individual endorsement or undertaking. The old English rule on this point has been changed, as above noted, by statute. Judge Story never supported the proposition that creditors with claims arising merely from partnership transactions should be permitted to make double proof.

Under the law of Louisiana, where the partnership in this case was formed and domiciled and its business carried on, the liability of LeMore and Carriere in contract was joint and several. Yet, contract creditors could not make double proof. Admitting that the liability of LeMore and

Carriere in tort was also joint and several, why should a creditor with tort claim have greater rights than a creditor with contract claim? In both cases, the liability of individuals arose from and was based entirely upon partnership transactions. If, notwithstanding the joint and several liability of the members of the firm in contract under Louisiana law, contract creditors could not make proof against the individual, why should tort creditors be permitted to do so,—even conceding a joint and several liability in tort? It may, indeed, be doubted whether the tort liability is any more joint and several than the contract liability. As pointed out in *Reynolds v. New York Trust Company*, the tort here was a joint one—of LeMore and Carriere jointly. The liability of LeMore and Carriere in tort should correspond to their liability in contract.

Counsel seek to explain *Reynolds v. New York Trust Co.* on the ground that it mistakenly follows the early English rule (which, however, was changed over forty years ago by statute), by which separate proof was denied even where the creditor has a separate, distinct and additional obligation of the individual partners. That this explanation is incorrect is indicated by the language of the Court itself. (See 188 Fed. 619):

“The brief of the Trust Company states, correctly we think, that ‘this is a question concerning the nature of legal rights.’ The creditor’s legal right was to make his claim joint or several; he could not make it both, and must elect. The creditor’s rights were in the alternative and not cumulative; he is forced to an election; **not according to the early English rule** that an election must be made even where there

are distinct contract rights against both the firm and the individual, but on the ground that at law his right is to have his cause of action joint or several, but not both."

This extract shows incontrovertibly that the Court proceeded not, as counsel suggest, in deference to the early English rule long since changed by statute, but upon the well established general rule that a creditor holding a joint and several claim must elect whether to make his claim joint or several—he cannot make it both.

The decision in *Reynolds v. New York Trust Company* on this point is directly supported by the decisions of this Court itself. See *United States v. Ames*, 99 U. S. 35, where the Court said at pp. 44, 45 and 46:

"Judgment in such a case is a bar to a subsequent action against the other joint contractors, because the contract being joint and not several, there can be but one recovery. Consequently the plaintiff, if he proceeds against one only of the joint contractors, loses his security against the others, the rule being that by the recovery of the judgment, though against one only, the contract is merged and a higher security substituted for the debt. *Sessions v. Johnson*, 95 U. S. 347; *Mason v. Eldred*, 6 Wall. 231. From which it follows, if the theory of the complainants is correct that the bond is to be regarded as the joint bond of the three partners, that they are without remedy against the other two, as they have proceeded to final judgment against the claimant. * * *

"Where the contract is joint and several the rule is different, to the extent that the promisee or

obligee may elect to sue the promisors or obligors jointly or severally; but even in that case the rule is subject to the limitation **that if the plaintiff obtains a joint judgment he cannot afterwards sue the parties separately**, for the reason that the contract or bond is merged in the judgment, nor can he maintain a joint action after he has recovered judgment against one of the parties, as the prior judgment is a waiver of his right to pursue a joint remedy. *Sessions v. Johnson, supra.*"

See also *Devost v. Twin State, Etc., Co.*, 250 Fed. 352.

In the present case it will be recalled that Muller, Schall & Company not only made proof against the partnership, but have actually received and been paid dividends on their partnership claim.

In *Reynolds v. New York Trust Co.*, the Court said further at page 619:

"If it be granted for the purposes of the case that upon a waiver of tort there arise contractual obligations which correspond to the tort obligations, then it follows not that there are two contracts, one joint and one several, but one contract which is joint, or in the alternative a number of contracts which are several. But, as we have seen, the proposition that upon a waiver of tort there arise contractual obligations corresponding to liabilities in tort is itself most doubtful."

And, in conclusion, the Court said (p. 620):

"Upon a review of the cases cited we find no sufficient authority for the allowance of double proof in a case like the present. Without questioning the

correctness of the decisions in the cases in the Second Circuit, or considering the difference in facts, we nevertheless do not feel constrained to accept the proposition that upon a waiver of tort there arise contractual obligations corresponding to tort obligations, or the further proposition that upon waiver of a joint tort there arise both joint and several obligations *ex contractu*. The contractual obligation arises only when value has been received for which in good conscience a defendant should pay."

The test in all the cases has been "Has a creditor a separate obligation from the partner made in the partner's individual capacity and not arising purely from his membership in the firm?"

If so, double proof may be admitted under the English statute and the American decisions (most of which were rendered under the Act of 1867).

But if not—if the claim against the partner is based entirely upon his participation as a member of the firm in the transactions of the firm (whatever the character of those transactions)—no double proof may be had—even though the liability of the parties is joint and several and not merely joint—whether such joint and several liability be in contract, as in Louisiana, or whether it be in tort upon the commission of the partnership tort.

If LeMore had been guilty of a separate tort practiced by himself apart from the regular partnership business, there might be some basis for the assertion of a particular, separate and additional claim against his separate estate. But when the only tort complained of is a joint and part-

nership tort regularly carried on by the firm in its business—by LeMore and Carriere jointly—why should a creditor with the joint tort claim fare better in bankruptcy than the creditor with the joint contract claim? Granting that he has a joint and several claim in tort and not a mere joint claim, why should he fare better than a contract creditor who has likewise (at least in Louisiana) a joint and several claim?

In both *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, and *Farmers Bank v. Ridge Ave. Bank*, 240 U. S. 498, the Supreme Court, through Mr. Chief Justice White, emphasized the controlling character of those provisions of the Bankruptcy Act by which individual estates are made subject peculiarly to claims of creditors of those estates while claims arising on partnership transactions are to be urged against partnership assets only. In the latter case the Supreme Court refused to permit one whose claim was on a partnership transaction to make proof against the individual estate, although there were in fact no partnership assets at all, the Court declining to follow the English rule to the contrary. This decision eloquently indicates the Court's desire to preserve unimpaired the policy of the Bankruptcy Act and its purpose to keep individual estates for individual creditors, relegating claims on partnership transactions to partnership assets.

It was the special object of the bankruptcy act to remove all purely technical circumstances in the administration of partnership and individual estates and to permit claims to be handled as justice and equity required. See *Fed. Stat. Ann.* (2nd. Edition, 1917), 590:

"Section 5g allows the filing and proof of claims of the partnership estate against the individual estates and *vice versa*, and removes all technical obstacles in the way of bringing these claims before the Court to be dealt with as justice and equity required."

Do not justice and equity require that the claims of Muller, Schall & Co., based entirely upon dealings with partnership should be treated entirely as partnership claims and not be accorded the right to double and triple proof against the individual estates?

The very language of the act itself provides that partnership estates shall be so administered as "to secure an equitable distribution." Will it be an equitable distribution to allow the present claimants, whose dealings were with the partnership throughout, the right to double and triple proof to the prejudice of creditors of the individual estates and the mass of the partnership creditors?

It is, in a material sense, a matter of indifference to the present respondents whether the claim for double proof here attempted should be permitted. The respondents are merely stakeholders. Their sense of the injustice of permitting double or triple proof in this case has been so keen however, that they have felt it their particular duty to contest the attempt at such proof. If the double or triple proof is permitted, a serious hardship will be done, first, to the admitted creditors of the individual estates, whose dividends will be heavily reduced, and, second, to the partnership creditors, who will lose the surplus otherwise existing in the individual estates which would revert to the partnership and be available for distribution among the

partnership creditors. This hardship will be accentuated in this case because all of the partnership creditors are in reality in the same position as Muller, Schall & Company; and to accord to Muller, Schall & Company the right to make a double and triple proof upon what was at all times essentially a partnership transaction, will be to prefer them to other creditors in the same situation.

Both because the claims against the individual estates, sound only in tort and **under the unanimous current of authority** are not provable, and because this is an attempt to make double and triple proof against the individual estates on a partnership transaction when no credit was extended to either individual partner, and no separate transaction had with him, to the prejudice of the individual and other partnership creditors, we submit that the judgments of the Referee, the District Court and the Circuit Court of Appeals should be affirmed, and the proof of Muller, Schall & Company rejected as against the individual estates of Ed. E. Carriere and Albert LeMore.

Respectfully submitted,

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D. B. H. CHAFFE,
MONTE M. LEMANN,

Attorneys for the Trustees in Bankruptcy,
Respondents.

APPENDIX.**Bankruptcy Act of 1867, Section 19:**

"And be it further enacted, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt.

"All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.

"If the bankrupt shall be bound as drawer, indorser, surety, bail or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability, shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

"In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the Court to have the present value of the debt or liability ascertained

and liquidated, which shall then be done in such manner as the Court shall order, and he shall be allowed to prove for the amount so ascertained."

"Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced.

"And any person so liable for the bankrupt, and who has not paid the whole of debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules.

"Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

"If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the Court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

"No debts other than those above specified shall be proved or allowed against the estate."

Bankruptcy Act of 1867, Section 33:

"And be it further enacted, That no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt;

"And no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

"And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty percentum of the claims against his estate, ('upon which he is liable as the principal debtor.' So amended Act of July 27, 1868, ch. 258, sec. 1), unless the assent in writing of a majority in number and value of his creditors who have proved their claims, is filed in the case at or before the time of application for discharge."

The provisions of the Bankruptcy Act now in force in England on the subject of provable claims are as follows:

Bankruptcy Act of 1883, Section 37:

"(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a con-

tract, promise, or breach of trust, shall not be provable in bankruptcy. * * * (3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

22.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 84.

WILLIAM SCHALL, JR., ET ALS., *Petitioners,*

VS.

FREDERICK CAMORS, ET ALS., TRUSTEES OF ESTATES OF
ALBERT LEMORE AND EDWARD E. CARRIERE,
BANKRUPTS, *Respondents.*

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

MEMORANDUM REPLY BRIEF FOR
RESPONDENTS.

If the Court please:

As petitioners have filed a reply brief which cites some inapposite authorities not noted in their original brief, we desire to make a short rejoinder. We ask the indulgence of the Court for the fragmentary

character of this reply which is due to the fact that petitioners' reply was served upon us only as we were taking train for Washington, and under the rules of the Court requiring that all briefs be filed before submission of the case, we have scant time for the preparation and printing of the present memorandum.

At page 5 of their reply brief petitioners seek to suggest that the claims against the individual estates are provable as claims against constructive trustees, citing Perry on Trusts. But as the passage quoted indicates on its face, in order that a constructive trust may be raised it is essential to show that the party against whom it is urged has himself received or become possessed of trust property. In the present case, as already fully set forth in our original brief, neither Lomore nor Carriere individually obtained any money or property or ever came into possession of any of the moneys of the claimants. Not a single authority can be found for the raising of a constructive trust against the individuals in such a situation. No assumpsit for money had and received can be maintained against individuals who never had or received any moneys or property. In addition to the authorities cited at pages 11 and 12 of our original brief, to the effect that no ground exists for the waiver of tort or the implication of an assumpsit where it cannot be shown that the defendant trustee has been himself unjustly enriched, see the discussion of Waiver of Tort, by Professor Keener, in 6 Harvard Law Review, 223, 269, where the rule is again laid down:

“Assuming the defendant to be a tortfeasor, in order that the doctrine of waiver of tort may apply the defendant must have unjustly enriched

himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damage for an injury done, his sole remedy is to sue in tort."

At page 7 of their reply brief petitioners refer to the cases holding that an action in assumpsit for money had and received is equitable in its nature. No one is questioning that. The point here is that assumpsit for money had and received cannot be maintained except where there is an unjust *enrichment* of the defendant. If further authority be required on this point see the treatment of the subject by Prof. Ames, in 2 Harvard Law Review, page 63, where the distinguished author says in his History of Assumpsit:

"It remains to consider the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined

in the Roman law as obligations *quasi ex contractu* than by our ambiguous 'implied contracts.'

"Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another." (Italics ours.)

See also Langdell, Equity Jurisdiction, pp. 38, 39:

"It is well known that every tort as such dies with the person committing it; and therefore no action at law founded strictly upon a tort ever lies against an executor or administrator as such, or against an heir as such. If, however, the deceased tort-feasor has been *enriched* by his tort, and his *ill-gotten gains have gone to his representatives*, justice clearly requires that the latter should restore them to the person injured; and accordingly they may be recovered by an action at law, if there be an action, not founded upon the tort, which is adapted to the circumstances of the case. Thus, if a tort-feasor have converted the fruits of his tort into money, an action for money had and received will lie against his executor or administrator. So if the tort consisted in wrongfully taking or detaining property, and the property so wrongfully taken or detained has gone to the executor or administrator, or to the heir (as the case may be) of the tort-feasor, an action will, of course, lie to recover it back. Frequently, however, there will be no action at law which will be adapted to the circumstances of the case; and in all such cases it seems that equity ought to interfere by compelling a restoration to the person injured of any fruits of the tort which can be found in the possession of the representatives of the tort-

feasor. This, however, is not entirely clear upon authority. (*Italics ours.*)

On pages 3 and 4 of their reply brief petitioners refer to cases where a married woman was permitted to make proof in bankruptcy, under the earlier acts, of claims against her husband for moneys loaned by her to him and which he had expressly agreed to repay. See *In re Blandin*, 1 Lowell 543, Federal Cases No. 1527; *In re Bigelow*, 3 Benedict 146, Federal Cases, 1398; *In re Jones*, 6 Bissell 68, Federal Cases No. 7444; *Fleitas vs. Richardson*, 147 U. S. 550.

These cases are upon their face not in point. In each of them there was involved an *express contract* upon the part of the husband. It so happened that in the particular States in which the cases arose, the wife was not permitted to sue her husband at law upon a contract, but was required to resort to equity for relief. It was properly held that the fact that the wife could not sue at law did not bar her from proving her claim in bankruptcy as one arising upon contract. Every one of the cases involved a *real contract in fact*, and no one of them lends any support to the contention that claims in tort may be proved where there is no element of contract or agreement.

At pages 9 and 10 of their reply brief counsel attempt to distinguish *In re Schuchardt*, Federal Cases No. 12,483, cited at pages 16, 20 and 91 of our original brief, upon the ground that there even the partnership had not received any of the moneys of the claimant. Your Honors will note, however, upon examining the case that the partnership did in fact receive the moneys which the claimants in that case had paid out. The partnership had, therefore, undoubtedly been benefited or enriched at the expense of the claimants. The

Court, however, declined to raise any implied contract against the *individual* member of the partnership which would permit the making of proof in bankruptcy against his individual estate, because there had been no enrichment of him individually. If it be true, as the petitioners in the present case contend, that the Court would not raise a contract in law even against the partnership in that case, even where it was shown that the partnership had been in fact benefited by the receipt of moneys derived from the claimants, how much more clearly must the Court in the present case decline to raise a contract in law against the individual estates of Lomore and Carriere, which neither directly nor indirectly received any of the moneys of the present petitioners!

While at page 11 of their reply brief petitioners refer to *Strang vs. Bradner*, 114 U. S. 555, relied upon in our original brief at pages 18 and 19, they do not attempt to distinguish it from application upon the proposition that a claim based on false representations is not provable against the individual members of the partnership who are not shown to have been individually benefited or enriched. It cannot be distinguished.

At pages 12 to 21 of their reply brief petitioners again seek to contend that this Court should hold tort claims to be provable notwithstanding the plain language of the bankruptcy act. In our original brief we have, we believe, demonstrated that there is no sufficient reason of policy why tort claims should be made provable. The complete answer to petitioners' suggestion, however, is as already noted, that the judge of the proper policy is not the Court but Congress, which framed the law. As to the intention of Congress we think there can be no reasonable difference of opinion,

for the reasons repeatedly pointed out by every Federal Judge who has squarely considered the point.

At page 101 of our original brief we said:

"The decisions of three Circuit Courts of Appeal and two District Courts, or eleven Federal judges in all, are unanimous and decisive against the claimants' contention."

This is an understatement. The decisions represent those of five Circuit Courts of Appeal and three District Judges in two other circuits, the cases unanimously holding that tort claims are not provable and that paragraph *b* of Section 63, adds nothing to the list of provable claims, being grouped as follows:

FIRST CIRCUIT: *Reynolds vs. New York Trust Company*, 188 Federal 611 (C. C. A.).

SECOND CIRCUIT: *In re New York Tunnel Company*, 159 Federal 688 (C. C. A.).

THIRD CIRCUIT: *Adams vs. United Button Company*, 149 Federal 48 (C. C. A.); *In re United Button Company*, 140 Federal 495 (D. C.).

FIFTH CIRCUIT: *In re Southern Steel Company*, 183 Federal 498 (D. C.); *In re Crescent Lumber Company*, 154 Federal 724 (D. C.).

SIXTH CIRCUIT: *Switzer vs. Henking*, 158 Federal 784 (C. C. A.).

EIGHTH CIRCUIT: *In re Hirschbaum*, 104 Federal 69 (D. C.).

NINTH CIRCUIT: *Moore vs. Douglas*, 230 Federal 399.

These decisions represent every Court which has considered the question. There is no case *contra*.

In the endeavor to meet the fact that the present bankruptcy act, like every other bankruptcy act pre-

ceding it, is primarily a traders statute, counsel for petitioners quote the language of this Court in *Wetmore vs. Markoe*, 196 U. S. 63. We are quite content to submit this case upon the language of this quotation as made at pages 18 and 19 of petitioners' reply brief, including the following:

"Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in *business or commercial life* freed from the obligation and responsibilities which may have resulted from *business misfortune*." (Italics ours.)

This language in no degree strengthens the contention that it is the policy of the present bankruptcy act, unlike any of its predecessors, to relieve a debtor of his tort obligations.

But if notwithstanding the foregoing discussion any doubt could remain as to the policy of the present bankruptcy law and whether Congress intended it to go beyond the earlier bankruptcy laws that remnant of doubt will be completely removed by reference to the debates in Congress at the time of the consideration of the present act.

The act was introduced on March 22, 1897, in the 55th Congress, 1st Session, as Senate Bill 1035. See Congressional Record, Vol. 165, page 118. It was referred to the Committee on the Judiciary and reported on the following day without amendment. Congressional Record, *Ibid.*, page 155. The reports of the debates in the Senate will be found on pages 173, 264, 601, 622, 645, 663, 694, 702, 709, 710, 764 and 783, Vol. 165, of the Congressional Record. There is not a single word in any of these debates to support the contention

that Congress intended the present bankruptcy act to be any broader in scope on the point under discussion or to be any less of a traders' statute than the earlier acts. On the contrary, the debates show conclusively that it was the intention of Congress to pass the bill as a commercial and business measure. The same result is shown by the reports of the debates in the House which will be found at pages 1777, 1832, 1836, 1860, 1885, 1923 and 1938 of Vol. 170, Congressional Record, 55th Congress, 2nd Session. It is further shown by the report of the House Judiciary Committee, which is Report No. 65, 55th Congress, 2nd Session, found in House Reports of that Congress, Vol. I, Serial No. 3717. Appended to the committee's report is a table of failures in the commercial and industrial world; and the whole text of the committee's report demonstrates that it was the intention of Congress to relieve traders.

There remains still another demonstration of the unsoundness of petitioners' contention as to the intention of Congress. In the bill introduced in the Senate as Senate Bill 1035, the section on proof of claims, which now appears as Section 63 was Section 64, the text of which is printed on page 609 of Volume 165 of the Congressional Record. In its then form the section read as follows:

"Sec. 64: *Debts Which May be Proved.*—a. Each debt of the bankrupt may be proved and allowed against his estate which is (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then

payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon contract express or implied; (5) founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments; and (6) *founded upon damages for injuries to the person or property of the claimant.* (Italics ours.)

"b. Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

The italicizing of clause (6) is ours. The Court will note that as originally introduced in the Senate the act contained this clause which would have made tort claims provable. The Court will further note that this clause was in paragraph "a" of the section corresponding to the present Section 63. The Court will further note that paragraph "b" of the Section in the bill as originally introduced was precisely similar to the paragraph "b" in the bill as finally passed. This in itself demonstrates that paragraph "b" was never intended to enlarge the class of provable claims or to make tort claims provable; because if that had been the intention of the original framers of the bill it would

not have been necessary to include clause 6 in paragraph "a" at all because paragraph "b" would of itself have been sufficient to accomplish that purpose.

The bill as introduced in the Senate was not passed by that body. The Senate adopted in lieu thereof a substitute offered by Senator Nelson which will be found at page 799 of Volume 165 of the Congressional Record. That substitute was much shorter than the original Senate bill and in its arrangement entirely unlike either the original bill or the bill as finally passed. It contained no special provisions as to what claims should be provable and no section corresponding to Section 64 of the original Senate bill or Section 63 of the bill as finally passed.

Senator Nelson's substitute was introduced in the House on April 23, 1897, and referred to the Committee on the Judiciary. See page 840 of Volume 165, Congressional Record. On February 16, 1898, the House Committee on the Judiciary reported the bill. See Congressional Record, Volume 170, page 1777. The report, which has already been referred to, is House Report No. 65, 55th Congress, 2nd Session, printed in Volume I of the House Reports for that Congress, bearing Serial No. 3717. In that report the House Committee on the Judiciary recommended that in lieu of the Senate Bill the House should pass a bill submitted by the committee. This bill was modeled along the lines of the original Senate bill introduced by Senator Lindsay and was therefore radically different from the substitute of Senator Nelson. It departed, moreover, in a number of important particulars from the original Senate draft of Senator Lindsay, among the departures being in the language of the section applying to provable claims. In the House draft that section appears as Section 63 (the number which it

bears in the bill as finally passed) and the language of the section is precisely the same as that of the law finally adopted. See page 22 of House Report 65, 55th Congress, 2nd Session.

The Court will note that the bill as reported by the House Committee therefore made the following changes in the section:

(1) The House bill omitted clause (6) which appeared at the end of paragraph "a" of Section 64 of the original Senate bill. It is this clause (6) which would have made tort claims generally provable.

(2) It introduced into clause (4) of paragraph "a" the words "upon an open account".

Otherwise the original wording of the original Senate bill was followed. Paragraph "b" relating to unliquidated claims was retained in precisely its original form.

The bill as reported by the House Committee was passed by the House with minor amendments not in any manner affecting Section 63. See Volume 170, Congressional Record, page 1946. Thereafter it went to conference. The Conference Committee reported it with some changes which in no manner affected Section 63. See Volume 175, Congressional Record, pages 5960, 6296. The report of the Conference Committee was agreed to by both Houses and the bill finally passed in the form reported by that committee. Congressional Record, Volume 175, pages 6299, 6426, 6435.

It thus appears that the section which would have made tort claims provable was *ex industria* stricken out by Congress.

This reference to the legislative history of the act further emphasizes the care that was taken by the framers of the act in setting forth in paragraph "a" of Section 63 the claims which should be provable. It

further indicates that paragraph "b" of the section was never intended by the framers of the bill to extend the list of provable claims; else it would have been unnecessary to insert clause (6) in paragraph "a" as originally contemplated for the purpose (afterwards abandoned) of making tort claims provable.

The foregoing so clearly demonstrates the intention of Congress that it is unnecessary to indulge in speculation with regard thereto; and it is unnecessary, therefore, to notice the charge made in petitioners' reply brief that we take entirely too narrow a view as to the intent of the lawmakers respecting the provability of claims. It is interesting to observe, however, that the same contention of undue narrowness of view was urged for the Ridge Avenue Bank in *Farmers' & Mechanics' Bank vs. Ridge Avenue Bank*, 240 U. S. 17, 489; but the Court declined to adopt that contention or the English authorities as against the clear provisions of the bankruptcy act.

That Section 63-a and not Section 17 is considered by this Court to control the definition of provable claims is shown by the remarks of Mr. Justice Pitney in *Zavelo vs. Reeves*, 227 U. S. 627, 630, where, after referring to Section 17, he said:

"For the definition of 'provable claims' we are referred to Section 63 which is set forth in the margin."

The Court then proceeded to review the various clauses of provable claims as listed in paragraph "a" of Section 63.

In *Wetmore vs. Markoe*, 196 U. S. 68, the Court in referring to the amendment of 1903 to Section 17 held:

“The amendment of February 5, 1903, excepting decrees of alimony from the discharge in bankruptcy was not new legislation creating a presumption that such decrees were not excepted prior thereto, but was merely declaratory of the true meaning and sense of the statute as originally enacted.”

This is another decision that the amendment of 1903 to Section 17 created no change in the law as to the provability of claims.

Prior to the amendment of 1903 Section 17 certainly lent no support to the contention of the present petitioners, particularly in view of the legislative history of Section 63 already noted.

Two further observations of interest in connection with petitioners' argument upon Section 17 are:

(1) Prior to the amendment of 1917 that section did not exempt from discharge claims based on fraud (where no judgment had been procured). *Crawford vs. Burke*, 195 U. S. 176. The original structure of the Act therefore gave no support to the contention that Section 17 by exempting claims for fraud from discharge would thereby indirectly indicate that such claims were provable. Clause (4) of Section 17 relates only to acts in a fiduciary capacity.

(2) As amended in 1903 Section 17, clause (2) does not include cases of fraud generally but only liability for obtaining property under false pretenses or false representations.

In the present case neither Lemore individually nor Carriere individually obtained any property by false pretenses or false representations. The property was obtained entirely by the partnership. If Lemore individually had obtained the property, an implied contract might be raised against him which would have

permitted action against his individual estate, while clause (2) of Section 17 would have exempted the claim from discharge. But neither of the individuals here obtained any property.

In view of the limitations of time upon us and what we believe to be the completeness of the answer to petitioners' claims as non-provable against the individual estates because sounding in tort only, we do not undertake any extended further discussion of the point against double proof, which is already covered in our original brief. We may note, however, that the additional English cases cited in petitioners' reply brief do not any of them support double proof in bankruptcy.

Ex parte Turner, Montague & McArthur, 255, cited, at page 6 of petitioners' reply brief was the case of a director who himself directly converted the trust property and received proceeds thereof in violation of his express contractual obligation. He received the proceeds himself and thereafter turned them over to the firm. Proof was properly made against his separate estate (not against the joint estate also as attempted in the present case.)

In *Ex parte Poulson*, De Gex 79, a trustee individually converted the trust property. The Court found that his partner had also come into possession of the proceeds and had joined in the misappropriation. It was held that proof might be made against each separate estate. No attempt was apparently made to prove against the joint estate.

In *Ex parte Burton*, 3 Montague, Deacon and De Gex 364, proof was made against the joint estate only.

In *Smith vs. Jameson*, 5 Term. Rep. 601, the facts were the same as in *Ex parte Poulson*.

In *Blair vs. Bronley*, 11 Jurist 617, and *Sadler vs. Lee*, 6 Beavan 324, no question of double proof against individual and joint estates was involved and indeed no question of administration of bankrupt estates.

But even if these cases were not distinguishable as they are they could not control this Court in the interpretation of the American bankruptcy law any more than the English authorities or text books on partnership which were cited in *Farmers' & Mechanics' National Bank vs. Ridge Avenue Bank*, 240 U. S. 498, could control the result there.

The latest authority in England is *In re Giles*, 61 Law Times Reports 83, cited at page 24 of our original brief.

That case, which denied the right to make proof for false representations against the director of a corporation cannot be distinguished from the present one unless the entity theory of partnership established by the bankruptcy act (see *In re Meyer* 98 Fed. 876, 20 Harv. L. Rev. 589, 8 Columbia L. Rev. 391, 13 Columbia L. Rev. 142) is to be ignored. Under that theory the partnership here was as distinct from the individual as the corporation was from the director in *In re Giles*. In Louisiana the partnership has always been held to be an entity even apart from the bankruptcy act. See *Smith vs. McMicken*, 3 La. Ann. 319, *Succession of Pilcher*, 39 La. Ann., 365.

The doctrine of election against which petitioners protest was held to be correct in *United States vs. Ames*, 99 U. S. 35, as well as by the Circuit Court of Appeals for the First Circuit in *Reynolds vs. New York Trust Company*, in 188 Federal 611. Counsel

have not met the effect of *Smyth vs. Ames*. *Chapman vs. Bowen*, 207 U. S. 89, where there was a separate contract by the individual, is not in point.

As to the American Federal cases cited by petitioners as permitting double proof, every one of them including *In re Farnum*, Federal Cases 4674, upon which petitioners particularly rely, presented a separate, distinct and individual contractual obligation and undertaking of the partner individually. This is fully pointed out in our original brief as well as in the excellent note to 39 Lawyers Reports Annotated, New Series, 391, which reviews all the cases.

The New York cases upon which petitioners rely all present instances of direct personal dealings with the individual partners against whom separate proof was permitted; but apart from this, they cannot control the correct interpretation of the bankruptcy law and the policy which it unmistakably established in Section 5, any more than the Louisiana law which imposes joint and several liability upon partners in contract could control it in *Miller vs. N. O. Fertilizer Co.*, 211 U. S. 496.

The transactions of the claimants in this case were, as the Circuit Court of Appeals and the District Court correctly held, entirely partnership transactions. There was no dealing by the present petitioners with either Lemore or Carriere individually. Neither Lemore nor Carriere individually stood in any trust or fiduciary relation to the petitioners, who had no contract with either of them. The representations complained of were made in the regular course of firm business by the firm. Every other firm creditor is in precisely the same position as the present petitioners. There is no more foundation for the proof against the

individual estates here, even in tort, than there would be for such proof upon express contract under the law of Louisiana where the partnership was domiciled and did business.

The New York law cannot avail to give the right to triple proof in bankruptcy. As Grubb, J., said in the opinion under review (Record, pp. 64, 65):

“We think the determination as to whether the claim is partnership or individual or both, should depend upon the real character of the transaction, and if that be unmistakably an exclusive partnership one, neither fiction nor implication should be resorted to to give it a different character.

“Each partner and his property is individually liable for all partnership debts as between him and the partnership creditor, and this obligation is joint and several at the option of the creditors. But as between his individual and partnership creditors under the bankrupt law the primary liability of his property is to the former. It would be contrary to the policy of the bankrupt law to permit the firm creditor by invoking such a technical rule of law to place himself on a parity with the individual creditors of the partners as to his individual assets and so circumvent the equitable distribution of partnership assets among firm and individual creditors provided for in the act.”

Respectfully submitted,

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